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June 22, 2004

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Memorandum of Ex Parte Presentation
WC Docket No. 04-30, Emergency Request for Declaratory Ruling

Dear Ms. Dortch:

In response to a staff request, SBC is supplementing the record in this docket with information demonstrating that the state court's review of the DPUC's decision did not address any Federal issues, and that the cost of the HFC system was born by the shareholders of SBC.

First, on February 23, 2004, at a stay hearing in CV-04 0525443S Southern New England Telephone v Department of Public Utility Control (DPUC) the court noted that it would address only the state statutory claims because the Federal issues were pending before the FCC.[1]

Second, in its decision in Docket No. 00-08-14, which authorized SBC Connecticut's affiliate to relinquish its cable franchise, the DPUC specifically acknowledged that SBC Connecticut's shareholders had funded the investment in and would bear the loss on the HFC facilities that proved not to be useful under the alternative regulation plan adopted by the DPUC:

[1] See hearing transcript at page 28, lines 21 to 24.

> The Department is aware that the HFC network is owned by the Telco, and the Telco will continue to have investment in plant and facilities for the HFC network deployment on its books until the plant is no longer used and useful. The Department has determined that, under alternative regulation, the cost of the investment in the HFC network that is not used and useful is a below-the-line cost that must be borne by shareholders.[2]

Of the total HFC investment, including all of the coaxial cable and associated active and passive devices, approximately $220 million was identified as not usable by SBC Connecticut in its provision of telecommunications services. Stated differently, this investment was not considered "used and useful." Therefore it was subject to "below-the-line" treatment, and consistent with the DPUC's order in the Relinquishment Docket, the Telco removed all these costs from the Telco's Gross Property, Plant and Equipment accounts on the regulated books, including the accumulated depreciation. Therefore, the Telco's ratepayers did not ultimately fund or pay for the HFC investment determined not to be usable.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter and attachments are being electronically filed. I ask that this letter be placed in the files for the proceedings identified above.

Please call me should you have any questions.

Sincerely,

/s/ Brian J. Benison

CC: Russ Hanser

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[2] Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity, Decision, March 14, 2001, at 18 ("Relinquishment Docket").

CV-04 0525443S :NEW BRITAIN SUPERIOR COURT

SOUTHERN NEW ENGLAND TELEPHONE :JUDICIAL DISTRICT OF

VS. :NEW BRITAIN, CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL :FEBRUARY 23, 2004

BEFORE:

THE HONORABLE MCWEENEY, JUDGE

A P P E A R A N C E S :

REPRESENTING THE PLAINTIFF:
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MARY H. FARRI
COURT MONITOR

THE COURT: We're in session on the matter of Southern New England Telephone versus the Department of Public Utility Control, Docket Number CV-04 0525443S.

Would counsel identify themselves for the record. We'll start over here.

MS. GARBER: Your Honor, I'm Peggy Garber, General Counsel with SBC, and with me is George Moreira.

THE COURT: Good afternoon.

MR. VALLEE: William Vallee with the Office of Consumer Counsel.

MR. HAINES: John Haines for the -- from the Attorney General's Office for the DPUC.

MS. JANELLE: Good afternoon, Your Honor. Jennifer Janelle, Murtha Cullina, on behalf of Gemini Networks Connecticut.

THE COURT: Okay. Now, this was scheduled on Southern New England's motion for a stay. And then we -- Attorney Janelle, you also filed a motion for a stay recently. Is that right?

MS. JANELLE: That's correct, Your Honor. We've actually, to avoid confusion, rather than call it a stay, we filed to have this entire proceeding held in abeyance based on SBC's filing with the FCC pursuant to primary jurisdiction.

THE COURT: Okay. And by that -- In your

paper, you indicated there were negotiations ongoing, so your understanding is that those will continue, the order would be in effect. Is that right?

MS. JANELLE: That is correct, Your Honor.

THE COURT: Okay, because of the FCC application that's pending.

MS. JANELLE: That's correct. And, excuse me, actually, Your Honor, if I may, we actually don't yet have status in this proceeding. We have filed a motion to intervene and I was advised by opposing counsel that there is no objection to that. So we'd like to have that granted by the Court.

THE COURT: In the case that's before me, the Southern New England appeal of the DPUC case, you're not a party to that. Correct?

MS. JANELLE: We were not a named party, no.

THE COURT: Okay. And you moved to intervene.

MS. JANELLE: We did move to intervene.

THE COURT: Okay. And that motion is granted without objection.

MS. JANELLE: Thank you, Your Honor.

MR. VALLEE: The OCC is in the same situation, Your Honor.

THE COURT: Okay. Any objection to that?

MS. GARBER: I always object to Mr. Vallee, but we'll let him play this time.

THE COURT: Okay. All right. So the OCC is also a party. The motion to intervene is granted.

What about the FCC case, the Gemini's motion that we should not be proceeding with the matters pending?

MS. GARBER: Your Honor, we would object to Gemini's motion for a stay of the appeal, unless there is granted a stay of the underlying decision, because we will be harmed if we are forced to proceed under the existing order.

The filing that we made with the FCC is limited only to the issues within their jurisdiction. They have no jurisdiction over our state law claims. And their claims that the DPUC did not follow proper procedure, did not follow Connecticut General Statutes 16-247a(b) when it issued this order, and that the order itself is unlawful purely under Connecticut law.

THE COURT: We'll argue that. Let me just ask you this about the status of the underlying case here. Is the record available on this case now?

MS. GARBER: By record, Your Honor?

THE COURT: Of the DPUC record.

MS. GARBER: The record of the legal briefs that have been filed, there is -- there was no evidentiary record taken below.

THE COURT: There was no -- Okay. So, we're ready to go on the -- in terms of a record being available, the proceedings, there were no evidentiary hearings. So, we have --

MR. HAINES: Your Honor, I can't talk to Tatiana Eirmann, whose case this is, I'm filling in for her. I don't know whether Louise Ricard, the executive director of the DPUC has the record finished yet that we would file. Certainly there are underlying proceedings in this case. And I think if you look at Tatiana Eirmann's brief on behalf of the DPUC, you're going to see that there's a very extensive and lengthy background to this matter. All of that will be filed with the Court.

THE COURT: But it wouldn't be a lengthy wait to get it to the Court.

MR. HAINES: I don't think so. I was going to check with Louise today, and I was otherwise tied up.

THE COURT: All right. As I understand it, the -- on the practical claim of addressing your request for a stay of the DPUC order while the appeal is pending. If we could get the appeal heard within a few months, and all you're obligated to do is negotiate during that period, how are you harmed?

MS. GARBER: Your Honor, we're harmed because the commission has absolutely no jurisdiction over these facilities. And because they've now exerted jurisdiction over these nontelecommunication facilities, they've clouded the title to the facilities.

I can't proceed with negotiations with third parties to sell the facilities because there's this overhanging order where the commission is -- has said it has jurisdiction when it has none.

In addition, while we negotiate, we're required to negotiate in good faith, which means at the end of those negotiations, which by law must be concluded within nine months, and could be concluded sooner if the commission acts faster, we have to be ready to provide what we've negotiated.

And it's our estimate that it will cost us 10 million dollars to get this network back up to an operating condition. We've taken all the batteries out of it. It's not powered any longer. We've taken a couple hundred miles of the coaxial cable out. We've taken out most of the active and passive devices. And I understand Your Honor has been involved with his network before in some earlier cases --

THE COURT: That's right.

MS. GARBER: -- so I'm assuming you know what I'm talking about.

THE COURT: Well, somewhat.

MS. GARBER: So, yes, we will be harmed because we don't operate this network anymore. We have to hire people, we have to train people. And all they're going to do is operate this network for our competitor, so we are harmed.

And, in addition, under the Connecticut -- under Connecticut law, if a statute is violated, that's per se irreparable harm. And there's no one that we can recover anything that we spend, both in the negotiations, getting ready to provide these facilities. We can't go against the commission. They're protected under the Eleventh Amendment. We can't go against Gemini. There's no statute or contract or anything that permits us to recover any of our losses.

So, we would argue that a stay is required.

THE COURT: So you're saying while the -- without the stay, you're going to have to invest this money into cranking up the system, to put it roughly.

MS. GARBER: Yes.

THE COURT: And when would you have to do that? You mentioned about selling it or something. Is there something imminent, or is this something that --

MS. GARBER: We were in discussions, Your Honor, until this decision came up.

THE COURT: Yes. And your claim of absence of jurisdiction is based on what claims?

MS. GARBER: Under 16-247b, before the commission has -- A-B, excuse me, a(b). Before the commission has jurisdiction, they have to first find that these are telephone company network facilities. And they never made that finding, they just assumed that they were. There's nowhere in their order where they said these are telecommunications facilities under Section 16-247a(b).

THE COURT: Well, didn't they rely on the record that that was what they were designed for, and that that was the -- That's their claim is their decision is based on their -- really, that that was what they were approved when you came in and asked for this system. And that's was what -- its purpose was to provide that.

MS. GARBER: Your Honor, that may have been the original intent, but it was never used. And if -- If we have to get into the Federal law --

THE COURT: Well, I don't think there's any claim --

MS. GARBER: -- which has also been adopted in Connecticut.

THE COURT: -- that it wasn't used. They're claiming it was used. I mean, I don't think that was what the commission found. It's just that it was designed to be used.

MS. GARBER: It was designed to be used. But that's not the test under State and Federal law. Under State and Federal law, it has to be used to provide telecommunication services for a fee to the public.

These facilities were never used by the telephone company to provide any telecommunication service for a fee to the public. Therefore they don't fit under the definition. And the DPUC never in its decision took that definition, walked through what was required, said you meet this, you meet this, you meet this. Instead, they just -- they said it's up on the poles, it's capable of being used, therefore it's a network element.

But that's not the definition under State and Federal law. They substituted their own definition.

THE COURT: Am I correct in that the -- Mr. Haines, I guess to you -- that the DPUC relied on its design that it was intended to be used? Is that fair to say?

MR. HAINES: I think that's absolutely correct, Your Honor, that the -- I mean there was a very extensive docket when this system was first proposed. That this was supposed to replace the existing copper system.

THE COURT: Right.

MR. HAINES: And it certainly was proposed to, and intended to --

THE COURT: Yes.

MR. HAINES: -- provide telecommunications, narrow band and broad band. And at some point it came to pass that SNET abandoned that, but the facilities are --

THE COURT: Well, let me just say --

MR. HAINES: -- and were still there.

THE COURT: Yes. Okay. Then that's just a legal question about undisputed facts that, you know, there was -- I mean, you don't dispute that it was designed to provide this service, it's just that --

MS. GARBER: No, we don't dispute that was designed. But the statute does not read --

THE COURT: No, I understand. Well, that's a clear legal question, I guess.

MS. GARBER: That's --

THE COURT: Yes. And under facts which aren't really disputed.

MS. GARBER: Right. But we also -- There are several other things the commission was supposed to have found. But if we look just at the commission's own brief at page 11, they set out what they believe they were required to do in this case. And, although we disagree that that covers every finding they were supposed to make, there were two critical admissions that they make. And one is that they should have found there was part of our telecommunications network, we've already gone through that. And the second one is that under 16-247b(a), they must make a finding that it's technically feasible to unbundled these facilities. Assuming they even have jurisdiction, they have to make that finding. They never made that finding.

And, in fact, they precluded -- they precluded the telephone company from even doing discovery on that issue. And so we were denied the right to conduct discovery on technical feasibility, there's absolutely no evidence presented in the case on technical feasibility, and there's no finding in the record on technical feasibility. And that's a prerequisite under the statute.

THE COURT: And it's your claim that these

State law claims are not going to be before the FCC.

MS. GARBER: No, Your Honor.

THE COURT: What are the issues before the FCC?

MS. GARBER: It's our belief that the FCC has actually preempted the DPUC from issuing the order that it issued in this case. Because the FCC just issued a 500-plus-page order in a case that's been pending for about three years, called the triennial review order. And in that order, the FCC looked at facilities similar to these, hybrid fiber copper facilities, and they said that a telephone company has no obligation to unbundle hybrid fiber facilities if that telephone company continues to provide its competitors access to the copper loop. And the telephone company, SNET, continues to provide access to its copper loop.

Therefore, under the Federal law, which preempts the DPUC, they can't even issue this order regardless of if these facilities are part of our telecommunications.

THE COURT: But you said that was on a copper system. Is that correct?

MS. GARBER: No. What they said is as long as we still have a copper system in place --

THE COURT: Yes.

MS. GARBER: -- and as long as we provide access to that to our competitors, we don't have to provide them access to our hybrid facilities. It's our option. As long as we provide them access to our copper facilities, we do not have to provide access to our hybrid facilities.

THE COURT: Okay. So that would be the argument before the FCC, essentially?

MS. GARBER: That's the main argument.

THE COURT: Yes.

MS. GARBER: There are several others also on preemption. The analysis that the commission says they conducted in this case is contrary to the findings of the FCC. They said that when you're trying to determine whether or not a competitor is impaired with that access, you don't look at that individual competitor's business plan. And that's exactly what the commission did here. They said Gemini wants to be an HFC provider. They don't want to use your copper. So we think they're impaired without access to your HFC.

The FCC said you cannot look at the specific business plan of the competitor. You have to look at all the factors, and you have to determine whether all competitors are impaired without access. And we have over 35 competitors who are using our copper facilities, or a combination of our copper facilities and their facilities to compete with us. Gemini can do the same thing. There's no impairment, there's no harm.

THE COURT: Let me ask you, Attorney Janelle, on the State statutory questions, the FCC's not going to look at that. Right? I mean --

MS. JANELLE: Well, Your Honor, most likely not. But the central -- the main issue of this entire case is -- is what the DPUC did under State statute consistent with Federal law. And that penultimate question. That governs, in fact, State law, as Attorney Garber pointed out. State law says that what the DPUC does pursuant to that statute must be consistent with State law.

And SBC themselves said, in their filing to the FCC, this matter is most properly heard by this commission, meaning the FCC. And we agree with them. And they went on to say that should this commission make a finding in our favor, the State court will have to grant our petition on that ground alone. So what they're attempting to do, first of all, we believe, is forum shot for a stay here. If they want a stay of the DPUC order, they should be seeking one at the FCC. And, in effect, they are. They're seeking an emergency order of preemption, preempting the DPUC's decision.

At such time as these Federal issues are resolved, they will most likely govern the very small State law question at issue in this case. And it's, we believe, a tremendous waste of time and resources to go through an entire appellate process here on an isolated issue of State law, which is so intertwined with, and so dependent upon the overarching Federal question. It really does not make any sense.

I mean everything that Attorney Garber has said here today, these are all arguments. They've been argued before the DPUC, they've been considered by the DPUC, and they've been rejected by the DPUC.

And as far as the harm is concerned in -- and I just have to point this out to Your Honor, counsel made the best argument for us. We have a DPUC decision that says we're entitled to access to this network. If Your Honor imposes a stay on that DPUC order, they're going to sell that network and we will never be able to have access to it, no matter what the ultimate resolution of this case is. Whether this Court or the FCC or anybody rules, that the DPUC acted properly.

THE COURT: Well, that's another -- I guess -- We'll talk about that. My question now is just on the -- They've raised a State Law claim that the FCC's not going to resolve.

Though you're right, that the -- those, if were preempted, then that resolves it, too. But they -- we may not be, and they still have the right to raise the State law claim that it's in violation of the State law.

MS. JANELLE: Your Honor, I'm sorry, if I may. We're not asking for the Court to dismiss this case. I mean the ultimate issue at the FCC, with the triennial review order, and what is currently on appeal in the DC Circuit, is can states issue these orders. And if the ruling comes out that yes they can, we can certainly take up this case and the State law issue at that time.

We're not asking for this case to be dismissed, merely held in abeyance pending resolution of the overarching question.

THE COURT: Do you have an opinion on when the FCC would resolve this?

MS. GARBER: No, Your Honor. They have no time -- They have no requirement under statute to act with any given -- within any given timeframe. As I said, the one case we just finished went on for three years. Granted it wasn't filed under an emergency petition, but they don't have to act at all. They can -- we can file this with them and they can just never act if that's -- if they decide not to.

So, if you stay our appeal, then we are -- you know, we are going to be harmed because we won't be able to proceed with the appeal. At the end of the negotiations, under Federal law because we have this outstanding State order, we will have to provide access to these facilities, and we will never get a penny of that back from anybody.

THE COURT: Well, what I'm thinking of doing -- and we'll all -- you'll all be heard on it, is to see when we could brief and argue how long a period that would take us to be ready to go on the merits. And then talk about, when we have that timeframe, understanding on how long it would be to be ready to argue the merits here, then look at -- then discuss the stay in that context. You know if there were -- What would be required, what would be done. And if it's a course of a couple of months, you know, what impact that would have. And, you know, maybe we could fashion a stay that would move the case along, but not have some irreparable impact on any of the parties.

So I'm thinking that, you know, we could do that. I think it gives the parties an opportunity to be heard on their issues, but also maybe we can move along and prepare for Gemini getting what they're claiming they're entitled to as well. I mean since the process does involve some negotiation period.

I mean it sounds like they're -- you know, this is not factually intense, and that we can -- legally it's, you know, another matter. But we could, you know, probably -- When do you think you could brief it, I mean the merits?

MS. GARBER: Ten days.

THE COURT: I mean I'm not going to hold you to --

MS. GARBER: Ten days, two weeks.

THE COURT: Okay. And then how about the other side?

MR. HAINES: As far as the DPUC, Your Honor, I think we've pretty much addressed the probability of success on the merits issue by dealing with the merits. I would think that perhaps we could reply a week after SBC's brief is filed.

THE COURT: Yes. Okay. And, Attorney Janelle and --

MR. VALLEE: The OCC would be fine with that, Your Honor.

THE COURT: Okay. And then on terms of what record we'd need here, what if we looked at getting the record in two weeks and then setting a schedule. Maybe, you know, allowing another month for briefs and replies, and then, like, early April have the argument. What would -- And then if we had a decision before the middle of May, is that -- What impact would there be for you under that type of schedule.

MS. GARBER: The problem is, Your Honor, that Gemini can file, under the Federal law 135 days after we start negotiations, they can file a case with the commission to resolve all open issues. And the commission could resolve those quickly or not quickly.

So within, you know, four months -- you're talking about out to May, so that's two of the four months. Within four months we could, by law, have to provide something.

Now, generally, it takes the commission longer than that to act on something like that, but there's the risk that we will -- we will have to provide them access to this network, and we will have to do it under the terms we negotiated. And, yet, what I'm hearing you say is, you know, don't spend the money, wait, let's wait until the middle of May and see what happens here, we won't be ready to perform. Then we will get penalized under the contract for failure to perform what we negotiated.

MS. JANELLE: Your Honor, can I be heard on this --

THE COURT: Sure.

MS. JANELLE: -- a moment, please?

THE COURT: Sure.

MS. JANELLE: Thank you. The 135-day negotiation period, as I stated in one of the filings that we've made, has already begun. We've already begun the negotiations. The 135-day --

THE COURT: When did that start? I'm sorry, go ahead. You were --

MS. JANELLE: We had our first meeting last Wednesday.

THE COURT: Okay. All right.

MS. JANELLE: Although, that is not the exact start date, we calc -- we decided on our start date, which makes our 135-day completion date, I want to say, July 26th. So, at that point we would be able to file with the DPUC, July 26. SBC would then have 25 days to respond to our filing, and then the DPUC has nine months to arbitrate the issues -- or --

MS. GARBER: Must complete within nine months --

MS. JANELLE: -- must complete within nine --

MS. GARBER: -- from the date we started negotiations.

MS. JANELLE: I'm sorry, you're correct.

But the point being that 135 days doesn't even expire until July, and you're talking about having a decision in the middle of May.

Additionally, Gemini has claimed, continues to claim, has claimed in negotiations, we are going to upgrade/maintain the network. We are going to pay for it. We are going to do it with our employees. There is going to be no cost whatsoever to SBC. These tens of millions of dollars are phantom dollars. They mean nothing in the grand scheme of things. There are tens of millions of dollars, and we're willing to take this negotiating risk so that they don't sell the network out from under us.

THE COURT: Attorney Garber, anything further other than that?

MS. GARBER: Yes. Under the law, Your Honor, if these are, in fact, unbundled network elements under Federal law, we are required to maintain them. We are required to repair them. We are required to be the one's responsible.

And what Attorney Janelle is arguing here is they want access to facilities we own, but they want to treat them like their own, and they want to go up and play with them and move them around and rearrange them. In our opinion, all of our telephone subscribers in the State of Connecticut are at risk of them doing something wrong with our facilities.

So, no, we are the ones who are going to be on the hook for the work.

MS. JANELLE: The point being, Your Honor, this, obviously, is going to have to be arbitrated. We're not going to have a final resolution in 135 days.

THE COURT: Okay.

MS. GARBER: Your Honor, might I suggest that perhaps we get a stay for 90 days while we try to get through this and brief it?

THE COURT: But what would you -- what would be the terrible damage of, you know, the commencing -- You've already commenced the negotiations, as you've been required to --

MS. GARBER: We were ordered to, Your Honor.

THE COURT: -- or as you were ordered to do. But, you know, you're moving along with the negotiations. The negotiation period isn't concluded, but you know --

MS. GARBER: We're being required to dedicate employees, and not an insignificant number of employees, because, remember, we don't have anybody who knows this network anymore, and we have to enter into an agreement to provide it to someone else in a fashion that will work. We have to -- we have to dedicate employees to those negotiations, which -- I understand I wasn't at the first meeting -- was it 60 days they wanted to conclude all the discussions on the coaxial network?

MR. MOREIRA: That's correct.

MS. GARBER: So, that's very intense. That's time consuming. We have to take people off of other projects and other things. That is a damage to us. And because the commission failed to follow the State statute, it's per se irreparable harm.

THE COURT: Well, it's hard for me to conclude that at this point. So, you know, that's a -- This is one of the cases where both parties are by the imposition, or not imposing the stay -- you know, I impose something on both parties. I'd like to act with full briefing on the issues and full argument. So, that's my inclination.

I mean, if you want to tighten up the schedule, it's about like 30 days to get the -- from when we get the -- we get the reply briefs in like a day or two before the argument and then -- and then do it from there. So if you, you know, can tighten it up on when you get the -- when you get the record in or something, I'm happy to do that.

MS. GARBER: But, if that's the case, Your Honor, then where's the harm to Gemini of waiting 30 days to start these negotiations?

THE COURT: Well, they say you want to --

MS. GARBER: They granted in the underlying case, Your Honor -- The commission was supposed to act in six months, Gemini gave then two extensions. It took the commission 12 months to act. So I don't understand why another month or two months of our not having to spend our money, our time, our effort to find out from this court or the FCC that, in fact, this ruling is unlawful. I don't understand where the critical harm is. Because Gemini can get service from us today on our copper network, just like 35 other competitors do today. They don't want it. They want this other network.

THE COURT: Well, the commission felt it was -- you know, they needed it. I'll review that, but I mean, you know, that is what we have here. That the commission did review it, and the OCC is advocating it, and the public interest and all. So, I mean, I can't ignore that.

MS. GARBER: But there are no facts, no hearings, no evidence. Gemini has the burden of proof in this case and there's no evidence. Not one piece in this case.

MS. JANELLE: Obviously, Your Honor --

MS. GARBER: These are fact --

MS. JANELLE: -- we disagree with that.

MS. GARBER: No. Who testified? What affidavit was put in? The DPUC, in its own words in the technical meeting, said that legal briefs are not evidence. I need witnesses. There were no witnesses; there were no affidavits. This is a fact-intensive matter and there's no evidence.

THE COURT: Well, I think the evidence was what was -- what they had in other cases about what the system was designed to do on their legal construction that if it was --

MS. GARBER: But where's the evidence on technical feasibility?

THE COURT: Well, I don't know. I guess the -- I mean maybe they based it on the record of what, you know, the system was. They were not strangers to the system. So, I don't know.

MS. GARBER: Your Honor, I challenge them to point where in the order it finds technical feasibility. It's not discussed.

MS. JANELLE: Your Honor, we don't want to belabor this, but, first of all, technical feasibility is clearly SBC's burden. SBC had the opportunity to put in their evidence and have a hearing, and they specifically waived hearings stating that they were not necessary. This has all been argued before the department. The department specifically said you had your chance and you waived the hearing on it.

So we made the findings based on the record we have. We believe that when the record comes into this court, you'll be satisfied that there is an -- there was administrative notice taking of all the prior dockets, which Your Honor is familiar with, because you presided over the appeals of those cases. There's ample evidence in the record, and we believe when you get the record, you'll -- you'll be satisfied.

We believe, as the DPUC believes, as the OCC believes, that this case was properly adjudicated. There's plenty of record evidence. They're well within their statutory authority, and all of these arguments are arguments that have been heard and considered and rejected by the DPUC. We're not sitting here today hearing anything that we have not seen and heard before.

MS. GARBER: That's typically the case in appeals.

THE COURT: That's why I like them.

Why don't you do this, why don't you take a few minutes, see if you can telescope it as much as possible in terms of -- you know, as narrow as you want to make it. And I assure you I'll decide within a month from when you argue it, and I'll try to do it sooner.

But, I mean, that's -- I think that's in view of what the claims are and what's at stake here, I think that's a fair way to resolve it. I'd like you to see if you could agree on a schedule. If you don't need reply briefs, you know, that's fine with me. If you want to reserve the option of, you know, scheduling it a week after you brief it, or something, and if somebody feels compelled to reply, then you can do that. I mean whatever you can agree to, if not, I'll set a schedule.

But I'd like to give you a few minutes to see if you can agree on that and -- Again, you can telescope it as short a period as you want, and I encourage you to do that. I think it's fair to everybody to try to get it resolved as soon as we can. So, I'll do my part and would urge you all to cooperate in putting it together in as short of period.

So, let's take a short recess and talk about what type of schedule we can do. Okay.

MS. GARBER: Yes, Your Honor.

THE COURT: All right.

MS. JANELLE: Thank you, Your Honor.

(Whereupon, a recess was taken.)

THE COURT: Have we come to some understanding on the schedule?

MS. GARBER: Yes, Your Honor.

THE COURT: Okay. And what would that be?

MS. GARBER: The telephone company will file its opening brief on the 27th of February.

THE COURT: Okay.

MS. GARBER: The other parties will file their replies on the 5th of March.

THE COURT: All right.

MS. GARBER: The telephone company, if it chooses to do so, will file a reply then on the 12th. And if you will schedule oral sometime the following week.

THE COURT: Okay. How about March 17th at 2 o'clock?

MS. GARBER: Saint Patrick's Day.

THE COURT: I know. We've tried to make it a holiday, but -- I'm still working on it.

MS. GARBER: That was 2 o'clock.

THE COURT: Two o'clock, yes. Okay. And, now, on the record, we're going to -- that hasn't been filed. When are we going to get that?

MR. HAINES: I will work as diligently as possible to find out where it is and what stage it's in.

THE COURT: Let set a date, and then -- We'll say the 27^{th}. If you can't get it in, file something and let us know.

MR. HAINES: Okay.

THE COURT: You know what's in it and you can go ahead without --

MS. GARBER: I thought I did until they told me there was all this other stuff.

THE COURT: Okay. Well, as long as it gets in before your sur reply, then -- Okay.

MS. GARBER: Your Honor, I just wanted to make clear that we're -- that we're talking about the state issues here in the appeal.

THE COURT: Yes.

MS. GARBER: We're leaving the federal issue to -- As long as you also understand that there's some -- it may be bleed over a little bit, but --

THE COURT: Sure.

MS. GARBER: Okay.

THE COURT: Yes. I understand that they're going to -- you're pursuing those in the -- before the FCC. Okay. We'll resolve the State statutory claims here.

MS. GARBER: Okay.

THE COURT: Okay. All right. So we'll have argument on March 17^{th}. The schedule is

February 25 -- February 27th, I'm sorry, for the plaintiff, the reply is March 5th, and sur reply by the plaintiff March 12th, and argument March 17th at 2 p.m.

All right. We're in recess.

* * * * *

C E R T I F I C A T I O N

I hereby certify that the foregoing is a true and accurate transcript of the tape recorded proceedings, to the best of my ability, in the aforementioned matter, heard before the Honorable Robert F. McWeeney, in the New Britain Superior Court Connecticut, on the 17th day of February, 2004.

Dated at New Britain, Connecticut this 8th day of April, 2004.

____

Mary H. Farri
Court Monitor

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 00-08-14 APPLICATION OF SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORPORATION AND SNET PERSONAL VISION, INC. TO RELINQUISH SNET PERSONAL VISION, INC.'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

March 14, 2001

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Donald W. Downes
Linda Kelly Arnold

DECISION

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A. CONCLUSIONS 39
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DECISION

I. INTRODUCTION

A. SUMMARY

By this Decision, the Department of Public Utility Control (Department) reviews SNET Personal Vision, Inc.'s (SPV or Company) plan to relinquish its certificate of public convenience and necessity (CPCN), and its plan to exit the cable marketplace in Connecticut. In particular, the Department finds that it lacks any statutory authority to compel SPV to continue to provide competitive cable service in Connecticut, but has sufficient means to ensure that SPV's marketplace withdrawal is non-disruptive and fair to SPV's remaining subscribers. Therefore, the Department accepts SPV's overall marketplace exit plan, with several specific modifications. The Department also finds that Connecticut Telephone has failed to demonstrate that it has the legal right to force the Southern New England Telephone Company (Telco) to transfer or sell plant and network to it that is used in the provision of cable service by SPV. However, it is clear that the Telco's Hybrid Fiber Coaxial (HFC) infrastructure is available to Connecticut Telephone, and other third parties, under terms and conditions prescribed by tariffs. It is also the opinion of the Department that tariff provisions made for network access do not preclude use in the competitive provisioning of services that may include cable services.

B. COMPANIES' PROPOSAL

By application dated August 11, 2000 (Application), Southern New England Telecommunications Corporation (SNET) and SNET Personal Vision, Inc. (SPV) request Department endorsement of their decision to relinquish SPV's Certificate of Public Convenience and Necessity (CPCN) and withdraw from the community antenna television (CATV or cable) market in Connecticut. In 1996, SNET proposed to participate in the video services marketplace and committed, through SPV, to compete with incumbent cable operators across the entire State of Connecticut using HFC technology to deliver ubiquitous, full service telephony, data and CATV service.[1] Beginning in 1998, however, SNET expressed concerns regarding SPV's continued commitment to CATV service because of HFC technology changes,[2] but expressed its willingness to maintain SPV's franchise until at least October 2000.[3] The Southern New England Telephone Company (Telco) and SPV (collectively, the Companies) now state that HFC remains unsuitable for delivering ubiquitous, full service telephony, and that SPV cannot financially support the continued deployment of a video-only HFC network.[4]

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1 See the Department's September 25, 1996 Decision in Docket No. 96-01-24, Application of SNET Personal Vision, Inc. for a Certificate of Public Convenience and Necessity.

2 See the Department's September 2, 1998 Decision in Docket No. 98-02-20, Joint Application of SBC Communications Inc. and Southern New England Telecommunications Corporation for Approval of a Change of Control, p. 14

3 See the Department's September 2, 1998 Decision in Docket No. 98-02-20, p. 48.

4 Application, pp. 11 and 12.

A study by Technology Resources, Inc. (TRI), the research and development center of SBC Communications, Inc. (SBC), accompanied and was submitted in support of the Application.

SPV submitted for the Department's endorsement a proposed market exit plan designed to ease customer transition to other video providers. The proposed exit plan includes customer notices and customer education regarding SPV’s business plans. SPV also proposed to offer a monetary credit to customers in good standing to help defray costs to install an alternate video service. Additionally, SPV proposes to provide one extra year of community access funding to each SPV-affiliated community access provider, based on SPV subscribership levels as of August 2000. Finally, the Telco states that coincident with SPV's withdrawal, it plans to offer a video component to its customers through the introduction of an unregulated Digital Broadcast Satellite (DBS) offering in Connecticut. Application, pp. 16-23.

C. Background of the Proceeding

By Decision dated September 25, 1996, in Docket No. 96-01-24, Application of SNET Personal Vision for a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service, the Department awarded an 11-year statewide CATV franchise to SPV. SPV is a wholly owned subsidiary of SNET that in turn is a wholly owned subsidiary of SBC. SPV’s original Franchise Agreement required that it serve the entire State of Connecticut by September 2007.

Just under three years later, SPV petitioned the Department for modifications to the commitments it assumed in Docket No. 96-01-24, based upon its experience implementing the terms and conditions of the original franchise agreement. By Decision dated August 25, 1999, in Docket No. 99-04-02, Application of SNET Personal Vision, Inc. to Modify its Franchise Agreement (Modification Decision), the Department concluded that SPV had demonstrated that technical limitations of its HFC network for combined telephony and cable television satisfied, at that time, the commercial impracticability test specified in federal law. The Department subsequently allowed suspension of HFC plant construction requirements, with certain exceptions.[5]

As of August 2000, SPV provided CATV service to approximately 29,282 subscribers in the towns of Branford, Darien, East Haven, Fairfield, Farmington, Meriden, New Britain, North Haven, Norwalk, Stratford, Wallingford, West Hartford, Weston, and Westport. SPV also serves portions of Avon, Berlin, Bloomfield, Bridgeport, Easton, Greenwich, Hartford, Newington, New Haven, North Branford, Stamford, and Trumbull.

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[5] SPV, SNET, and SBC subsequently appealed portions of the Department's August 25, 1999 Decision. That appeal is currently pending before the Connecticut Superior Court (SBC Communications, Inc. et al. v. Department of Public Utility Control, Docket No. CV 99-0498108-Judicial District of New Britain). In the appeal, SPV filed a request to stay the requirement that it build underground plant and serve multiple dwelling units without contributions in aid of construction. On October 27, 1999, SPV was granted a temporary stay pending the filing of additional briefs and ruling on a permanent stay. Additional briefs were filed on November 8, 1999, but no permanent stay ruling has yet been issued.

D. Conduct of the Proceeding

Pursuant to a Notice of Hearing dated October 10, 2000, the Department conducted public hearings on November 20, November 21, and December 8, 2000, at its offices, Ten Franklin Square, New Britain, Connecticut 06051. The Department took administrative notice on December 13, 2000, of the Companies' Responses to Interrogatories CATV-17 and CATV-19 in Docket No. 99-04-02. The hearing was closed by Notice of Close of Hearing dated January 11, 2001.

All parties and intervenors were afforded the opportunity to file written exceptions and present oral arguments on a draft Decision issued by the Department on January 19, 2001.

E. Parties and Intervenors

The Southern New England Telephone Company, SNET Personal Vision, Inc., and The Southern New England Telecommunications Corporation, 310 Orange Street, 6th Floor, New Haven, Connecticut 06510; the Office of Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051; and the Office of the Attorney General, Ten Franklin Square, New Britain, Connecticut 06051, were designated as parties to this proceeding. Pursuant to Conn. Gen. Stat. § 16-331(c)(2), the SPV Statewide Advisory Council was designated an intervenor. Connecticut Telephone & Communication Systems, Inc. and Connecticut Broadband, Inc. (CTBB, collectively, CTTEL) were granted intervenor status. The New England Cable Television Association (NECTA), Cablevision of Connecticut Limited Partnership, Cablevision of Litchfield, Inc., and Cablevision Systems of Southern Connecticut, Limited Partnership (collectively, Cablevision) were also designated as intervenors.

F. Public Comment

At the November 20, 2000 hearing, a member of the Branford Community Television (BCTV) Board commented that SPV's planned exit from the cable market should not extinguish SPV's obligations under a February 8, 1999 agreement with BCTV. That agreement states, in part, that ". . . BCTV shall designate the origination location for the [community access] programming during the term of this agreement, BCTV may change the origination location one time without cost by providing Personal Vision with at least 120 days prior written notification." BCTV urged the Department to reaffirm SPV's continuing obligation for the support promised, recognizing that BCTV is near an agreement to move its programming origination location. Tr. 11/20/00, pp. 7-9.

Also at the November 20, 2000 hearing, the chairman of the SPV Statewide Advisory Council (Advisory Council) stated that SPV has generously fulfilled contractual obligations with third-party community access providers, local towns and schools that sought to originate community access programming. The Advisory Council requests that suitable provisions be made for the continued support of community access operations and for the financial support of the Advisory Council during any period established either for termination of SPV's CPCN or for its transfer. Tr. 11/20/00, pp. 10-22.

In keeping with its support of competition in the Connecticut cable marketplace, the Advisory Council requests that SPV remain in operation until a suitable successor is found, and would agree to build out the SPV statewide franchise within a reasonable period of time. The Advisory Council suggests that SNET reconfigure its network to isolate the video portion, and then lease or sell that service or network to CTTEL or other qualified entity who would agree to fulfill the terms of SPV's original Franchise Agreement. Tr. 11/20/00, pp. 10-22.

II. DEPARTMENT ANALYSIS

A. LEGAL REQUIREMENTS

SPV seeks Department endorsement of its decision to relinquish its CPCN to provide cable services, and also seeks Department approval of its market exit plan. As noted above, the Department concluded in the Modification Decision that SPV had demonstrated that its HFC network for combined telephony and cable television satisfied, at that time, the commercial impracticability test specified in federal law.[6] In the following analysis, the Department will determine if the HFC technology, as deployed by the Companies, continues to meet the commercial impracticability tests (e.g., by determining if any HFC technology changes have since occurred that would repudiate the Department's previous findings).

The commercial impracticability tests are set forth in Section 625 of the Communications Policy Act of 1984, 47 U.S.C. § 545. 47 U.S.C. § 545(a) states in part that:

> (1) During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise
>
> (A) in the case of any such requirement for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability(.)

Pursuant to Section 625(f) of the Communications Policy Act of 1984, 47 U.S.C. 545(f), the term "commercially impracticable," with respect to any requirement applicable to a cable operator, means that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

The Department will also determine, if SPV continues to meet the commercial impracticability test, whether the Company should be allowed to relinquish its CPCN,

[6] Modification Decision, p. 1.

and whether any changes are necessary in its market exit plan to protect the public's interest.

B. HISTORY OF THE TELCO'S HFC TECHNOLOGY

In 1992, the Telco began to analyze how it could reduce costs to maintain and modernize its copper distribution telephony plant. The Telco sought to construct a network that would provide cost efficiencies and enable competitively-priced delivery of a full product line, including information, communication and entertainment. Application, Docket No. 99-04-02, p. 7.

According to the Telco, several of the nation's largest telephone and cable companies had already chosen HFC technology for full service networks. By the end of 1992, Bell Atlantic announced an experiment using HFC technology in New Jersey and in 1993, Pacific Bell announced a plan to construct a full service network throughout California utilizing HFC, by 2010. In addition, Time Warner Cable constructed and began experimenting with a full service HFC network to provide video and telephone services in Orlando, Florida. Id., p. 8.

In 1993, the Telco secured opinions on HFC technology from Bellcore and other industry experts. During this period, Lucent Technologies (Lucent) and other equipment manufacturers such as ADC Telecommunications (ADC), Motorola, and Arris/Nortel, announced development of HFC-based product lines. In August 1994, the Telco entered into a contract with Lucent as its primary HFC vendor. Id., p. 7.

In January 1994, the Telco announced I-SNET, which included statewide outside plant modernization utilizing HFC and switch upgrades.[7] The Telco anticipated significant opportunities for efficiencies in terms of operation, maintenance and ability to quickly provide telecommunications services to customers. The Telco stated that I-SNET was "proved-in" based on telephony cost savings alone, and that potential video revenues were incremental revenues to the cost savings the Telco expected to realize. When conversion to HFC was complete, the Telco expected that network operating costs would be significantly less per access line than with the traditional twisted copper pair network. According to the Telco, approximately 18% of the original estimated cost savings was expected to be realized by the end of 1998. However, as a result of changes in the development of HFC, the Telco states that these anticipated cost savings failed to materialize. Id.

In its application for a CATV franchise,[8] SPV proposed to rely on the Telco's HFC infrastructure for delivery of its CATV services (i.e., as HFC cable was deployed in the Telco infrastructure, SPV would lease network capacity in those markets from the Telco and independently deploy its own CATV services). Under this arrangement, SPV was financially responsible for all direct costs associated with providing video services and

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[7] See the Department's March 13, 1996 Decision in Docket No. 95-03-01, Application of the Southern New England Telephone Company for Financial Review and Proposed Framework of Alternative Regulation.

[8] Docket No. 96-01-24.

50% of the HFC costs.[9] This 50/50 cost allocation assumed that each home passed by HFC-based facilities would subscribe to the Telco's telephone services and SPV cable services. That is, SPV would be responsible for 50% of the common costs of all homes passed whether it serves those homes or not. Application, Docket No. 99-04-02, p. 11.

In October 1995, the Telco began a HFC telephony trial in Stamford, equipping 35 customers with HFC facilities supporting secondary access lines. The trial was expanded in May 1996 to 200 customers and the primary lines of all trial customers were converted to HFC facilities to further evaluate the feasibility of the associated technologies. Separately, in September 1996, SPV received its statewide CATV franchise. By November 1996, the Telco further expanded the HFC-related telephone trial to 2,000 customers with primary lines supported by HFC, without copper line back-up. Id., pp. 8 and 9.

Lucent, then a major manufacturer and supplier of HFC-related components, announced in November of 1996 that it would no longer be an HFC vendor. SPV states that Lucent had achieved a leadership role in the development of HFC based upon the demand for HFC technology and equipment supply contracts with telephone and cable companies that had projected HFC's full service network viability. However, beginning in 1996 many large telecommunications companies began to back away from HFC, leading to Lucent’s abandonment of HFC. Id., p. 9.

The Telco undertook its own HFC review and ultimately decided to continue deployment of an HFC-based infrastructure, despite the need to change vendors to ADC. According to the Telco, no standard interfaces had been developed between critical HFC network elements to allow equipment from different manufacturers to work together, so in late 1996 and early 1997, the Telco removed all Lucent equipment from its network, central offices and poles, and began designing new processes and procedures.[10] Id., pp. 9 and 10.

In February 1997, while the Telco began its transition to an ADC-equipped network, the National Electric Safety Code (NESC) standards subcommittee denied the Telco's June 1996 request for a modification to allow placement of an independent power supply source as part of the fiber strand in the communications "gain" on telephone poles. As a result of that ruling, the Telco terminated its 2,000-customer HFC-based telephone trial and removed the independent power supplies previously deployed. Docket No. 99-04-02, Response to Interrogatory CATV-14. The Telco claims that it has not found a cost-effective means of providing an independent power supply source and has used commercial power with battery back-up and portable generators. The Telco states that such an arrangement is an acceptable approach for a very small number of customers, but not for broad scale use. Application, Docket No. 99-04-02, p. 10.

The Telco states that at about the same time, many of the companies that had deployed HFC-related technology in their networks started to report that provision of

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9 See further discussion regarding the lease arrangement in Sections II.C.2.c and II.C.2.e, below.

10 The Telco estimated that Lucent's announcement to withdraw from the HFC market delayed its HFC deployment by approximately 12 months.

telephone service over an HFC network is not technologically and economically viable. Beginning in 1997, Pacific Bell, NYNEX, Bell Atlantic, and Time Warner began to retreat from, and subsequently reject, HFC as a full service network solution. At the time of the Modification Decision, no incumbent local phone company, including the Telco, offered both telephony and CATV services on HFC. Id., pp. 10 and 11; Docket No. 99-04-02, Responses to Interrogatories CATV-14 and CATV-15.

C. COMMERCIAL IMPRACTICABILITY TESTS OF 47 U.S.C. § 545

As noted above, the Department must establish and re-examine certain facts to assess whether the Companies continue to meet the following tri-partite commercial impracticability test set forth in 47 U.S.C. § 545:

- Was the commercial practicability of HFC a basic assumption on which the requirement to utilize HFC was based?

- Did a change in conditions occur regarding HFC's viability subsequent to the execution of the Franchise Agreement, and if such a change occurred, was that change within the Companies' control?

- Is HFC commercially impracticable for the Companies at this time?

1. Docket No. 99-04-02 Findings

a. Was the commercial practicability of HFC a basic assumption on which the requirement to utilize HFC was based?

In the Modification Decision, the Department noted that 47 U.S.C. § 545(a) prohibits franchising authorities, such as the Department, from conditioning a franchise award upon the CATV operator's use of a particular transmission technology.[11] Nevertheless, as discussed in the Department's September 25, 1996 Decision in Docket No. 96-01-24, and in the Franchise Agreement that resulted from that Decision, HFC technology was expected to offer a modern, financially viable, commercially practicable, full service platform for the delivery of telephony and video services. Modification Decision, p. 8, citing Response to Interrogatory OCC-22; September 25, 1996 Decision in Docket No. 96-01-24, pp. 1, 27 and 28.

The Department also determined at the time that the I-SNET network was "proved-in" based on telephony cost savings alone, and the potential video revenues were incremental revenues to the cost savings that the Telco expected to realize. Modification Decision, p. 15. When conversion of the Telco's network to HFC technology was complete, the Telco expected that network operating costs would be significantly less per access line than with the twisted copper pair, with approximately 18% of the original estimated cost savings expected to be realized by the end of 1998. Id., p. 9, citing Docket No. 99-04-02, Application, pp. 7 and 8.

[11] "No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."

Finally, the Department determined that SPV planners assumed that SPV would not construct its own CATV network, but instead would obtain access to the Telco's HFC cable infrastructure via a lease arrangement.[12] Id., pp. 5, 9, 15 and 27, citing Docket No. 99-04-02, Application, Exhibit G; September 25, 1996 Decision in Docket No. 96-01-24, p. 63. No party to Docket No. 99-04-02 disputed that SPV's lease of the Telco's HFC network in concert with the Telco's provision of telephony services over the same network was a basic assumption underlying SPV's CATV franchise award. Id., p. 9.

Based on its review of the record in Docket No. 99-04-02, the Department concluded that the commercial practicability of HFC was a basic assumption upon which the requirement to utilize HFC was based.

b. Did a change in conditions occur regarding HFC's viability subsequent to the execution of the Franchise Agreement, and if such a change occurred, was that change within the Companies' control?

In the August 25, 1999 Decision, the Department noted that in the 1992-1994 time period, while the Telco was developing its own full service network plan, several of the nation's largest telephone and cable companies had already chosen HFC technology to support full service networks.[13] Based on its own research and need for a full service network, the Telco entered into a contract with Lucent as its primary HFC-related technology vendor in August 1994. Id., p. 7; Tr. 6/22/99, pp. 67 and 68.

Subsequent advances in copper loop technologies such as xDSL expanded service and bandwidth capabilities of copper networks so that with some enhancements, copper networks could efficiently and economically offer high-speed broadband services. These advances led to decreased demand for HFC technology, and an abandonment of HFC technology[14] for a full service network.[15] Lucent, the major manufacturer and supplier of HFC components, announced its intent to withdraw from the HFC vendor market in November of 1996.[16]

Other technological and economic shortcomings regarding HFC full service networks then arose, such as lack of vendor support,[17] a lack of reliable and cost-

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12 ". . . the I-SNET network over which SPV will deliver its CATV services is a full-service HFC network designed for the simultaneous transmission of telephony and video signals." September 25, 1996 Decision in Docket No. 96-01-24, p. 63.

13 By the end of 1992, Bell Atlantic announced an HFC experiment in New Jersey. In 1993, Pacific Bell announced a plan to construct a full service HFC network throughout California by 2010. Time Warner Cable constructed and began experimenting with a full service HFC network to provide video and telephone services in Florida. Also during this period, Lucent and other equipment manufacturers such as ADC, Motorola, and Arris/Nortel, announced development of HFC-based product lines. See Modification Decision, p. 4, citing Docket No. 99-04-02 Application, pp. 7 and 8; Tr. 6/22/99, pp. 67 and 68.

14 See Discussion in Section II.B regarding Lucent's 1996 announced withdrawal from the HFC vendor market.

15 See Docket No. 99-04-02, Responses to Interrogatories CATV-4 and CATV-10.

16 See Docket No. 99-04-02, Application, p. 9; Response to Interrogatory CATV-8.

17 See Modification Decision, pp. 11-13 and Response to Interrogatory CATV-5; 1999 TRI Report, p. 17; Tr. 6/22/99, pp. 33 and 34; Tr. 7/8/99, pp. 347 and 348, 472 and 473.

effective operational support systems (OSS) and procedures,[18] and powering concerns.[19] The Department concluded that significant changes occurred or were occurring regarding HFC's viability subsequent to the execution of SPV's Franchise Agreement, and that despite the early promise of HFC technology as a full service network solution, the complete slate of services offered by the Telco as of August 1999 was not available on an HFC-based network. The Department also concluded that the considerable decrease in demand for and ultimate abandonment of HFC technology as the foundation for a full service network was unanticipated, as was the extent to which telecommunications companies, vendors and suppliers would curtail or abandon rollout of HFC products, thereby curtailing the development of reliable and cost-effective OSS and procedures. Modification Decision, pp. 11-13. Coupled with demonstrated reliability and powering limitations associated with HFC technology, and advances in copper loop technologies, the Department presumed that if the Telco successfully sought a vendor to meet all of its HFC-related needs, those stand-alone costs to the Telco would be prohibitive. Id., p. 13.

Lucent's decision to withdraw from the HFC market, the NESC's rejection of the Telco's waiver request, and the telecommunications industry's retreat from HFC technology as the foundation for a full service network solution were in no way under the Telco's control, nor were any of the HFC technology changes. Paradoxically, SPV's delivery of CATV services over an HFC infrastructure was found to be very reliable, and customer feedback on the value and quality of its CATV product was positive. Docket No. 99-04-02, Response to Interrogatory CATV-12; Tr. 6/22/99, pp. 16, 50 and 176.

c. Analysis of the commercial practicability of the Companies' HFC network

47 U.S.C. § 545 states that a cable operator may obtain modification of its cable franchise where it is commercially impracticable for the operator to comply with such requirement, and the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability. As discussed above, “Commercial impracticability” is defined as follows: "[W]ith respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result in a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based."

According to the legislative history of Section 625 of the Cable Communications Policy Act of 1984:

> These procedures are created because the Committee recognizes that cable operators compete in a changing marketplace. Modification in

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18 1999 TRI Report, p. 17

19 Unlike a traditional copper network, all of the equipment (except the tap) in a network that incorporates HFC technology requires power to operate. In a traditional copper network, customers retain the ability to dial out (for example, to E-911) if commercial power fails. If commercial power fails on an HFC network that is not equipped with an independent power source, the customer cannot dial out. See also Modification Decision, p. 13.

franchise obligations may be necessary to adapt to changes in market conditions and consumer demands. The procedures established under this section are intended to supplement, and not replace, other procedures available for modification of franchise obligations, including all applicable contract actions and remedies, and modification through mutual consent of the cable operator and franchising authority.[20]

The legislative history of Section 625 goes on to state that:

This standard is meant to cover situations where, for example, the particular equipment or facilities required by a franchise has not developed or functioned technologically as anticipated, or is not available; or is available only upon terms sufficiently more burdensome to the operator than when the offer to provide such facilities and equipment was made that courts in similar situations under the UCC have found impracticability; or the equipment or facilities were offered in order to provide services which regulation has prohibited the cable operator from offering.[21]

In agreeing to various obligations imposed by the Department and contained in its Franchise Agreement, including obligations to utilize a statewide HFC-based network and deploy digital technology within five years, SPV assumed the viability of the proposed HFC technology to simultaneously support video and telephony use and to realize certain financial goals, as depicted in the pro forma projections submitted with its franchise application.

In the Modification Decision, the Department concluded that significant technological changes outside of the Companies' control and unforeseeable at the time SPV entered into its Franchise Agreement, fundamentally changed circumstances and warranted a modification of SPV's Franchise Agreement pursuant to 47 U.S.C. § 545.[22]

The Department also noted critical distinctions between a typical contemporary CATV system rebuild and the replacement telecommunications/CATV network that the Telco planned to construct and lease in part to SPV. Cable operators typically choose to upgrade their plant utilizing HFC technology to achieve two-way transmission capabilities, but unlike incumbent local exchange companies such as the Telco, cable operators are not required to upgrade their plant to provide telecommunications services ubiquitously nor are they required to offer all the services that incumbent telecommunications companies offer. See Docket No. 99-04-02, Responses to Interrogatories CATV-16 and OCC-5; 1999 TRI Report, p. 17.[23]

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[20] Application, Docket No. 99-04-02, p. 33, citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 70-71 (1983).

[21] Id., p. 71.

[22] See the Modification Decision, p. 15; Docket No. 99-04-02, Response to Interrogatory CATV-19; Tr. 7/8/99, pp. 442, 445, 449-451

[23] TRI went so far as to state that HFC networks are unsuitable to deliver ubiquitous telephony service because of other reasons such as cost-effectiveness and lack of necessary circuitry to provide required services. 2000 TRI Report, pp. 16-20.

Without the ability to utilize HFC for telephony and realize the originally anticipated telephony cost savings, the Companies indicated that they could not financially support deployment of a statewide HFC network. Docket No. 99-04-02 Application, Attachment C; Tr. 7/8/99, p. 442. While under the terms of its then-existing Franchise Agreement, SPV would incur negative returns throughout the study period.[24] However, the Telco previously "proved-in" its I-SNET business case based on the telephony cost savings associated with offering a full suite of telephony services; potential video revenues were incremental revenues to the cost savings that the Telco anticipated.[25]

d. Docket No. 99-04-02 Conclusions

In the August 25, 1999 Decision, the Department determined that commercial practicability of HFC was a basic assumption upon which the requirement to utilize HFC technology was based. The Department also found that significant changes occurred or were occurring that impacted HFC technology's viability subsequent to the execution of SPV's Franchise Agreement, and that none of these changes were within the Companies' control. Considered in tandem with the forecasted lack of financial viability, the Department concluded that, at the time of the Modification Decision, the Companies met the commercial impracticability test codified at 47 U.S.C. § 545. Modification Decision, p. 15. Accordingly, the Department concluded that the Companies were entitled to some, but not all, of the Franchise Agreement modifications sought in that proceeding.[26]

2. Re-examination of the tri-partite commercial impracticability test

In this proceeding, the Companies maintain that no new information has become available that would impact the basic assumptions underlying the Department's Modification Decision. According to the Companies, HFC technology is still not capable of providing the full suite of telephony services offered today by the Telco, and no changes in the actual and forecast financial data previously presented to the Department have occurred that would make SPV service over a video-only HFC cable infrastructure viable. Application, pp. 7 and 9.

In the following sections, the Department will determine whether any changes have occurred, subsequent to its Department's findings in the Modification Decision, regarding either HFC technology's viability for a combined full service network or the financial viability of SPV's provision of CATV service over a video-only HFC cable infrastructure.

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[24] Docket No. 99-04-02, Response to Interrogatory CATV-19.

[25] Docket No. 99-04-02, Response to Interrogatory OCC-22; Tr. 6/22/99, pp. 22, 39, 253, 260 and 261.

[26] Among the franchise modifications granted was a delay in SPV's HFC deployment while the Companies assessed HFC and explored alternative technologies such as DSL-type technologies; a requirement that the Companies file on or before October 1, 2000 a technical re-assessment of HFC with an interim report due March 2000; a requirement that SPV launch service by April 1, 2000, in all or part of six additional towns where HFC had already been deployed. As discussed in Section 1.C., SBC, SNET and SPV appealed the Department's denial of the Companies' requests that SPV not be required to serve multiple dwelling units and provide service in areas served by underground utilities, without contribution in aid of construction. That appeal is still pending.

a. Does the commercial practicability of HFC remain a basic assumption on which the requirement to utilize HFC was based?

In the instant proceeding, no participant has challenged the Department's prior finding that HFC's commercial practicability was a basic assumption upon which the requirement to use HFC was based, and no new evidence has been brought to light that would contradict that finding. Commercial practicability of HFC technology for the Companies was and remains a basic assumption upon which the requirement to utilize HFC was based. See Tr. 11/20/00, pp. 61 and 62; Modification Decision, p. 9.

b. Did a change in conditions occur regarding HFC's viability subsequent to the August 25, 1999 Modification Decision, and if such a change occurred, was that change within the Companies' control?

According to the Companies, no changes have occurred subsequent to the Department's findings in its Modification Decision regarding either HFC's viability for a combined full service network or the financial viability of SPV's provision of CATV service over a video-only HFC network. Application, pp. 7 and 9. SPV's delivery of CATV services over HFC remains reliable, and customer feedback on the value and quality of the CATV product remains positive. Tr. 11/20/00, pp. 56, 207; Response to Interrogatory CATV-40.

However, the record indicates that incumbent local exchange companies (ILECs), such as the Telco, continue to move away from HFC technology as the means to achieve a full service network in favor of other strategies. Tr. 11/20/00, pp. 67 and 68, 85; 2000 TRI Report, pp. 6-8. Likewise, as discussed in further detail in the next section, contemporary trends in the CATV industry indicate a general preference for Internet Protocol-based (IP) applications, via Data over Cable Service Interface Specification (DOCSIS) standards, to provide telephony services on HFC networks. Tr. 11/20/00, p. 87; Tr. 12/8/00, pp. 700 and 701; 2000 TRI Report, pp. 6-9. These two continuing trends obviously lessen HFC's viability as a full service platform. Because the Companies lack the market power to influence either the telephone industry's move away from HFC as a means to provide a full service network or the cable industry's move toward IP-based applications, neither of these developments were within the Companies' control.

c. Analysis of the commercially practicability of the Companies' HFC network

Is the HFC "Full Service Network" achievable today?

As noted above, the Companies state that no significant developments have occurred that would alter the Department's Modification Decision findings regarding HFC suitability as a full service network. In support of their position, the Companies submitted a report developed by TRI (2000 TRI Report) that updates information provided in the initial TRI report,[27] and also updates information contained in the TRI

[27] Submitted on April 1, 1999, in Docket No. 99-04-02.

interim report filed in March 2000, regarding the status of HFC technology and potential alternative video technologies. According to the Companies, the TRI Report confirms that telecommunications networks incorporating HFC technologies are not currently suitable for the delivery of the ubiquitous, full service telephony that the Telco provides in Connecticut. The Companies also state that although some technologies may hold promise for the future provision of video services, those are not yet technically mature, except for DBS. Application, pp. 12 and 13; Tr. 11/20/00, pp. 69, 185 and 186.

For cable companies with telephony plans, the TRI Report identifies increasing interest in and development of IP-based telephony, that differs in many respects from the traditional telephony architecture, but most notably in that it is not circuit-switched. As the CATV companies continue to migrate away from network solutions that combine HFC technology with circuit-switching in favor of cable modem/DOCSIS-based telephony standards, TRI concludes that this new focus will halt any CATV/HFC industry plans to develop telephone services that are necessary in a ubiquitous, backwards-compatible telephony replacement network, such as that depicted in the SNET original business case. 2000 TRI Report, pp. 1, 7 and 8; 24 and 25; Application, pp. 7-12; Tr. 11/20/00, pp. 65 and 216.

For those telephony companies with video product plans, TRI states that they have begun to take advantage of advances in other emerging access technologies, such as Digital Subscriber Line (DSL), and DBS broadcast video technologies, which allow new services to be provided on, and in concert with, the existing circuit-switched telecommunications network of the incumbent local exchange carriers. According to TRI, these distribution technologies, unlike HFC, can be deployed on a cost-effective "as-needed" basis, and, most importantly, preserve all key telephone network criteria. Application, pp. 21-23; Tr. 11/20/00, p. 64. TRI testified that no other telephone or cable company is utilizing HFC for the delivery of ubiquitous telephone and CATV products.[28] Tr. 11/20/00, pp. 185 and 186. Taken together, TRI concludes that the change in focus in the HFC landscape has diverted attention away from developing solutions regarding HFC's ability to serve in a full service network.

The technical criteria that TRI listed in its initial report offered a backdrop against which networks that incorporate HFC technology could be assessed for viability. These criteria included backward service compatibility, interoperability with embedded OSS, service quality, service reliability/availability, customer security and privacy, and scalability. Application, pp. 9 and 10; Tr. 11/20/00, pp. 66 and 67.

According to TRI, because DOCSIS is still in its infancy, and IP telephony protocols are still being developed, concerns regarding scalability are invoked because a full service network provider has to reach all subscribers with not only telephony services, but data services too. Tr. 11/20/00, pp. 67 and 68; Response to Interrogatory

[28] Nationally, the Companies report that only one ILEC, Qwest, currently offers both telephony and video on the same technology platform. According to the Companies, Qwest is conducting a VDSL (Very High-bit Rate Digital Subscriber Line) market trial to over 50,000 customers in the Phoenix, Arizona area. The Companies state that Qwest has indicated that, while it is still studying this technology, significant (30-40%) reductions in equipment costs are required to make it commercially viable. Response to Interrogatory CATV-4; Tr. 11/20/00, p. 88.

CATV-69. The lack of standards and trial data also raise questions concerning reliability, quality, and security and privacy issues.[29] Id. With regard to OSS interoperability, TRI states that integrating the management of new network architectures into these systems is extremely difficult and costly.[30] TRI notes that while the CATV industry is now developing new OSS to support various functions, these systems are very early in their development cycle and it is unclear whether they can provide the quality and/or scale needed for a ubiquitous full service network. Application, pp. 10 and 11; 2000 TRI Report, p. 13.

Moreover, the Companies state that the suite of telephone services that the Telco offers today remains unavailable on an HFC-based telecommunications network, and, based on current suppliers' product literature, it appears that suppliers have no plans to develop a number of the required services,[31] including Digital Data Service, PBX Lines and Trunks, Analog Private Line for Voice, Switched Digital Data Service (Switched 56), Fractional T1 service, digital enhancer, ISDN basic rate access (ISDN BRI), and DID/DOD services. Revised Response to Interrogatory CATV-2; Application, pp. 10 and 11, Tr. 11/20/00, p. 51. According to the Telco, its current provision of these services covers in excess of 150,000 lines, trunks, and/or circuits, and no alternative exists that delivers exactly the same interface or capability as each of these services. Tr. 11/20/00, pp. 78 and 85, 188. And despite the presence of multiple suppliers in the marketplace, the Companies state that because each offers a proprietary product, "mixing and matching" of services from a variety of vendors is precluded. Tr. 11/20/00, p. 63. Issues delaying development of some of these services include a lack of demand, while the bandwidth-intensity of some offerings has hampered their provision over an HFC-based network because of limited bandwidth availability. Response to Interrogatory CATV-69.

According to the Companies, all HFC plant investment that was intended to support telephony and cable is owned by the Telco. Response to Interrogatory CATV-11. As planned, the Telco would continue to have this investment on its books until SNET management deems the investment is no longer used and useful in the provisioning of telecommunications or broadband services. In the short term, the Telco would continue to provide service to SPV via the Network Operating Arrangement, under the existing arrangement, until SPV no longer requires service. Id. Following SPV's market exit, the Telco's recovery plan provides that any reused investment would continue to reside on the Telco's books and be depreciated at the appropriate depreciation rate. Id. In support of the proposed treatment of this investment, closing journal entries associated with SPV's planned market exit were provided. Response to Interrogatory CATV-13.

[29] For example, the HFC system over which a customer would use a cable modem for telephony is a shared infrastructure with a signal going to multiple customers; encryption is therefore required to make sure the calls are secure and private. Tr. 11/20/00, p. 66.

[30] In conjunction with others, the Telco started to develop and integrate new OSS to manage its HFC networks, but development costs became prohibitive when the other companies abandoned video plans and deployments.

[31] The Companies assert that CATV providers do not need to provide these services and are thus not generating any demand for the necessary product development

As noted above, in awarding a CPCN to SPV, the Department approved SPV's proposal to rely on the Telco's HFC-based network for delivery of video services. A Shared Service Agreement (SSA) for SPV was developed in Docket No. 96-01-24, by which SPV was financially responsible for all direct costs associated with video and 50% of HFC cable costs; SPV would be responsible for 50% of the common costs of all homes passed whether or not it serves those homes. The cost sharing arrangement with the Telco and other affiliate companies includes services such as management advisory services, legal, government relations, accounting, data processing and other costs. SPV's financial statements list operations and support from related parties as an expense line item consisting of costs related to the Network Operating Arrangement and Shared Service Agreement. This expense line item includes the capital cost of the network and SPV's use of the network, the cost of the facilities, transport costs per FCC Tariff 39, and the cost for management functions and support.

In its Modification Decision, the Department indicated that it would "reserve judgement until a future proceeding on what changes, if any, are appropriate in the SSA and network facilities operating arrangement between" the Companies. Modification Decision, p. 15.

At some time between the Department's August 25, 1999 Modification Decision and January 1, 2000, the Companies changed the SSA without notice to the Department, to allocate network costs 85% to SPV and 15% to the Telco, rather the 50/50 allocation that had been used historically. Response to Interrogatory CATV-15. According to the Companies, the allocation change was necessary to comply with the FCC's fully allocated costing concept specified in Accounting Safeguard Order 96-150, and to avoid cross-subsidy by the telephone subscribers of the cable franchise. Response to Interrogatory CATV-71; Tr. 11/20/00, p. 91. The Companies state that external auditors, auditing on behalf of the FCC, confirmed the propriety of adjusting to 15% the Telco's share of the HFC network. Tr. 11/20/00, p. 301. As a result of this change,[32] SPV's share of network costs increased by $8.3M for the year 2000. Response to Interrogatory CATV-73.

The Companies stated that while fiber optic portions of the network used by SPV are presently being used for telephony services, pieces of the network that would not be used and useful by the Telco would ultimately be written off. Tr. 11/20/00, pp. 138-140. The Companies also testified that SPV clearly did not obtain the projected financial goals, the anticipated benefits of HFC technology to the Telco were not forthcoming and there was no realization on anticipated telephony cost savings. Accordingly, the Companies state that no cost savings or revenue benefits were ever realized on the telephony side. Tr. 11/20/00, pp.164-166.

From a financial viability perspective, the Companies state that without HFC operating as a full service network, SPV cannot financially support, under any scenario, the continued deployment of HFC technology to support a video-only network, even with substantially increased revenue assumptions. The Companies state that substantial unanticipated cost increases as a result of SSA changes contributed to HFC's economic unfeasibility and commercial impracticability as a video-only network. As described

32 Based upon a cost study submitted in Docket No. 99-04-02. Response to Interrogatory CATV-17.

above, the Companies believe that HFC technology has not proven financially viable to support a full service network, and is not expected to do so in the foreseeable future. Companies' Brief, pp. 19-24.

The Companies provided in Docket No. 99-04-02 a financial analysis evaluating HFC technology and its suitability for delivering a ubiquitous full service network. Response to Interrogatory CATV-19. The analysis demonstrated a set of cash flow scenarios each utilizing different service assumptions, as did analyses presented by the Companies in this proceeding. Response to Interrogatory CATV-8; Late Filed Exhibit No. 1. The assumption scenarios depicted different conditions that would need to occur to achieve profitability, including increases in cable service rates, decreases in programming costs, penetration rate increases, reductions in acquisition cost and elimination of the buried cable obligation. Each scenario indicates that SPV could not achieve profitability and that SPV would continue to have negative cash flow without additional subsidies from the parent companies.

The Companies testified that SPV has continuously incurred losses and is expected to continue to do so. Tr. 11/20/20, pp. 126 and 127. The Companies also presented SPV's December 31, 1999 audited financial statements and unaudited financial statements through quarters ending June and September 2000. Responses to Interrogatories CATV-9 and CATV-14; Late Filed Exhibit No. 2. The independent Auditors Report (Auditors Report) contained notes to the financial statements disclosing that SPV suffered losses from operations since it began providing service in 1997. The Auditors Report states that SPV has liabilities due to its affiliates and is dependent upon SBC to provide working capital to fund operations. The Auditors Report further states that although not guaranteed, SBC intends to continue to provide funding, and that without this funding, there is substantial doubt about SPV's ability to survive.

d. Positions of the Participants

The AG and the OCC state that the Companies, and their parent, SBC, are predisposed against cable service and are already committed to providing video services via digital broadcast (DBS or "satellite dish" service) instead. The AG and the OCC both believe that the Companies have engaged in a concerted and systematic effort to prevent SPV from becoming financially viable in order to facilitate exit from the cable business. AG Brief, pp. 5, 11 and 12; OCC Brief, pp. 6 and 7.

According to the AG, the Telco has failed to prove that it has any legal obligation to provide the “full suite” of telecommunications services to every single customer that it serves, and the Telco admitted that no such obligation exits. The AG maintains that any failure of HFC technology to provide certain telecommunications products and services is the direct result of the Telco's efforts to thwart such development by making only languid efforts to create demand for those products and services. The AG further states that six of the seven services that the Telco identified as being unavailable on any HFC-based network are business services, whereas most customers connected to HFC facilities are residential. The AG also states that the seventh service, used by both business and residential customers, is readily available to customers via cable modem, and the other six services may soon be available. AG Brief, pp. 8-10. The OCC expressed views similar to the AG, and added that most of seven unavailable services are not widely used because they have been supplanted by superior products. OCC Brief, pp. 8-10.

The AG believes that the Companies ensured that SPV appears unprofitable by changing the allocation of HFC costs between the Telco and SPV from 50%-50% to 15% for the Telco and 85% for SPV. The AG also believes that the Companies unreasonably limited SPV's revenue streams to ensure that SPV does not become profitable. The AG states that HFC technology is fully capable of providing not only quality video services, but also voice service and high-speed data service. The AG further states that the Companies dramatically limited SPV's earning potential by limiting the HFC network to cable service only. AG Brief, pp.12-14.

The OCC believes that the Companies' claim that SPV's cable operation is not financially viable is without basis and should be rejected by the Department. The OCC also believes that the capability to deliver data, at a modest incremental cost, would supplement the technological and financial viability of an SPV video and telephone HFC network. OCC states that it is financially feasible and would be profitable for the Companies' HFC-based network to deliver video and telephony. OCC Brief, pp. 2 and 7.

CTTEL states that the HFC-based network as deployed by the Telco is commercially viable and can support all necessary telephony products where HFC facilities exist today. CTTEL acknowledges that the current HFC technology may not provide advanced business applications, but does not believe that limitation supports the Companies' claim that the HFC system is commercially impracticable for residential applications such as plain old telephone service (POTS). CTTEL also questions the Companies' assertions that all advanced business telephony applications are not available for HFC applications. CTTEL Brief, pp. 23-25.

CTTEL believes that the Companies distorted SPV's financial statements by placing interest, taxes, depreciation and amortization in a figure that is purported to represent earnings before interest, taxes, depreciation and amortization (EBITDA). According to CTTEL, the Companies' claim that HFC is not financially viable is based on accounting methods that misconstrue the true cash flow margin of the HFC network. CTTEL further states that the Companies, through inter-company cost allocations, have artificially included items of the Telco's interest, depreciation, taxes and amortization in the EBITDA operating income calculation for SPV. CTTEL Brief, pp. 4, 19-22. CTTEL also presented testimony attempting to reconcile SPV's financial statements. Late Filed Exhibits Nos. 14 and 15. In support of its position, CTTEL presented a reformatted annualized September 30, 2000 year-to-date SPV financial statement and a projected income statement that included scenarios placing video, data and voice service over the HFC network. Id.

e. Department Analysis

As noted above, commercial practicability of HFC technology was and remains a basic assumption upon which the requirement to utilize HFC technology was based. Also, the only changes that have occurred subsequent to the Modification Decision, regarding either HFC's viability for a combined full service network and the financial viability of SPV’s provision of video service over a video-only HFC-based network, are industry trends away from HFC technology as a transport medium for telecommunications services. These changes were not in the Companies' control, and served to lessen HFC's viability as a full service platform.

The Department is aware that the HFC network is owned by the Telco, and the Telco will continue to have investment in plant and facilities for the HFC network deployment on its books until the plant is no longer used and useful. The Department has determined that, under alternative regulation,[33] the cost of the investment in the HFC network that is not used and useful is a below-the-line cost that must be borne by shareholders. Since the Companies have not decided their plans and future uses of the coaxial cable and cable-related equipment, the Department will order the Companies to file plans for final disposition and accounting treatment. The plans must include any portions of the network that are scheduled to be sold, retired, leased, and/or written-off the Telco's and SPV's books and its related effect on the Telco's depreciation accounts. The plans must also include any investments in the HFC network that are reusable and that will continue to reside on the Telco's books. Furthermore, the Department will order the Companies to include in its plans for disposal of SPV assets an independent assessment of the fair market value of the video-related assets of SPV. Lastly, the plan should include provisions for fully informing prospective parties of the anticipated equipment inventory, its operational condition and any applicable warranties. The Department will order the Companies to leave in place all SPV-owned equipment until such time as SPV's disposal plan is approved and executed. At such time as responsibility and ownership of the SPV equipment is transferred, said equipment shall be removed or relocated as agreed by the respective parties.

The OCC's claim that SPV operations are financially feasible and that it would be profitable for the Companies' HFC-based network to deliver video and telephony are offset by SPV's actual experiences, and TRI's studies, proving that the HFC network is not suitable for the delivering a ubiquitous full service network. The Department does not believe the AG's argument that the Companies altered the accounting treatment to ensure SPV appears unprofitable, by changing the allocation of HFC costs between the Telco and SPV from 50%-50% to 15% for the Telco and 85% for SPV, has merit. The Department believes that in order to comply with the FCC's prescribed fully allocated costing concept, the Telco was correct in changing the allocation to 15% for the Telco and 85% for SPV. Response to Interrogatory CATV-71. The Department will not require any changes to the cost sharing structure of the Network Operating Arrangement under the existing Shared Service Agreement.

SPV's 1999 financial statements were audited by independent outside auditors in accordance with generally accepted accounting principles. SPV's financial statements contained an income statement that correctly calculated its EBITDA with an itemization of expenses that included expenses related to the cost sharing arrangement between SPV and the Telco via the Network Operating Arrangement and Shared Service Agreement. The Department is not persuaded by CTTEL's claim that the Companies have presented intentionally misleading information that grossly distorts the financial

[33] Docket No. 95-03-01, Application of The Southern New England Telephone Company for Financial Review and Proposed Framework for Alternative Regulation.

condition of SPV. The Department believes that CTTEL's assumptions are flawed as they understate SPV's going forward costs for network investment, SPV's use of the network, the cost of leased facilities, Tariff 39 transport prices and the cost for management functions and support. The Department also questions the accuracy of CTTEL's projected income statement depicting profitable SPV operations based on the inclusion of video, data and voice services over the HFC-based network, because CTTEL's assumptions are based on unsubstantiated penetration rates and profit margins.

With regard to the SSA changes, the Department accepts the Telco's arguments in support of the need for the change in allocation from 50/50 to 85/15. However, the Department is disconcerted by the Companies' lack of notice regarding this change until queried by the Department in this proceeding, months after the change had been implemented. The Department is aware of the Telco's need to comport with FCC requirements and the limited discretion it has in matters such as these. However, the reallocation of costs between affiliate entities constitutes a material change in the costs reported to the Department by both parties and merits notification by the parties at the time such changes are made - not when they become noticed - to ensure that no affected party is denied the right to understand the implications of any such change.

In the Modification Decision, the Department found that the Companies met the commercial impracticability test codified at 47 U.S.C. § 545 regarding financial viability of an HFC-based network to support a full service network. The Companies' most recent financial data indicates that SPV continues to be unprofitable, and has been so since its inception. Evidence continues to support the Companies' assertion that HFC, as deployed by the Telco, has not to date proven financially viable, and is not expected to do so in the foreseeable future.

Moreover, fundamental technical shortcomings continue to abound for HFC technology deployed in support of a full service network. The full slate of telephone services that the Telco offers today remains unavailable on an HFC network, and, future availability is uncertain at best. Services that the Telco presently provides over its telephony network to more that 150,000 lines are unavailable as HFC telephony services, and in most cases, exact HFC substitutes for these services are unavailable from any vendor. No other telephone or cable company is utilizing HFC for the delivery of ubiquitous telephone and CATV products. Other concerns presented during this proceeding, including scalability uncertainties, underdeveloped OSS, privacy and security issues, are valid.

There is no doubt that the Telco's business case for the HFC network, approved by the Department, contemplated a single, full service HFC network to all classes of subscribers. That is, the full suite of services would be made available, not some blending of some services over dual, separate HFC and telephony networks. Claims that the Companies deliberately diminished SPV's profitability by not simultaneously offering duplicate services over its telephony network and its HFC network, are without merit.

As it concluded in the Modification Decision, the Department continues to find that, as presently deployed, and without the ability to utilize HFC for telephony and realize the originally anticipated cost savings, SPV can not financially support the deployment of a statewide HFC video network. The Department finds that the Companies continue to meet the tri-partite commercial impracticability test. The Department will next evaluate whether the Companies may relinquish SPV's CPCN, and if so, the terms under which the Companies would do so, including the proposed market exit plan.

D. NETWORK DESCRIPTION

To facilitate review in following sections, the Department herein provides a technical description of the network over which SPV provides service. SPV's network architecture has essentially three tiers, with operational responsibility shared with the Telco through operating and shared service agreements. At a high level of review, the first tier comprises the headend to the remote hub, the second tier consists of the link from the remote hub to the end office, and the remaining third tier is the portion from the Telco end office to the SPV customer's home or office. See September 25, 1996 Decision in Docket No. 96-01-24, p. 26.

At the first tier, the headend includes equipment that receives off-air and satellite broadcasts, and direct feeds, of programming contracted for by SPV and intended for retransmission over the SPV network. The signals are "conditioned" for transport and transmitted to remote hubs via the fiber optic facilities made available to SPV by the Telco. SPV retains responsibility for operation and maintenance of the signal reception equipment located at the headends and remote hubs. Tr. 11/20/00, pp. 258-269, 560 and 561.

Delivery of all programming transmissions from the signal reception sites to the headends and to the remote hubs is provided by the Telco to SPV in accordance with terms and conditions prescribed in the Telco's FCC Tariff 39, the Multichannel Video Service Tariff. This tariff provides SPV dedicated point-to-point transmission over the Telco fiber optic facilities at generally available rates. September 25, 1996 Decision in Docket No. 96-01-24, p. 26

Tier two constitutes transport of SPV programming signals from the remote hubs to the Telco end offices, also under terms and conditions of FCC Tariff 39. Id. Under this arrangement, SPV contracts with the Telco for routing and control equipment needed for its CATV services in the Telco end offices for which SPV will retain full ownership. Maintenance responsibilities as well as operational control over transmissions between the SPV remote hubs and the Telco end offices are performed by the Telco under contract with SPV. Id.

Tier three involves direct access to and use of the Telco HFC network by SPV to forward its programming to SPV subscribers. This tier begins at the Telco end offices and ends at an SPV subscriber's premise. SPV programming signals travel over fiber optic facilities to nodes owned and maintained by the Telco.[34] Upon reaching a respective node, the programming signal is converted from light signals to electrical

[34] Light transmission signals end, and electrical signals begin, at the nodes.

signals and is then forwarded to a selected subscriber address by means of coaxial plant. September 25, 1996 Decision in Docket No. 96-01-24, p. 26.

The Companies maintain that the HFC plant is a Telco asset that is not owned by SPV; stated another way, SPV has no cable network. Response to Interrogatory CATV-11; Companies' Brief, p. 33; Tr. 11/20/00, p. 177. The Companies listed SPV's equipment and assets as of September 30, 2000. Response to Interrogatory CATV-74, Attachment A. The Companies state that no fair market value has been determined for the HFC plant as fiber has and will be reused leaving only a portion of an overall HFC network remaining. Response to Interrogatory CATV-20. The Companies also state that SPV is currently in the process of evaluating its entire list of assets to ensure that the documentation is complete and accurate. Once the list is finalized, the value of the assets will be determined. In light of the fact that these assets cannot be sold until after SPV's customers have been successfully transitioned off SPV's network, SPV has not established a deadline for the completion of this asset evaluation. Response to Interrogatory CATV-83.

The Companies anticipate that SPV's assets would be put up for sale following the conclusion of this proceeding. However, the Companies believe that upon SPV's exit from the cable marketplace, there would be no network to transfer or sell except for, perhaps, certain portions of the coaxial cable and those portions of the network that are used exclusively for the provision of cable television services. Tr. 11/20/00, pp. 72 and 73, 175.

The Telco intends to use the fiber portion of the network to provide telecommunications services. As planned, the Telco would decide whether to sell or remove the coaxial cable portion of the HFC network following SPV's market exit. Response to Interrogatory CATV-77; Tr. 11/20/00, p. 97. The Telco is unwilling to identify any future uses or plans under consideration for future uses of the combined fiber and coaxial network. Tr. 11/20/00, p. 212. However, the Telco acknowledges that it is presently using some fiberoptic cable in the HFC plant for services provided by subscriber loop carriers (SLC) and other high speed transport services. Response to Interrogatory CATV-18. The Telco also states that Project Pronto, SBC's initiative to deploy next generation digital loop carrier for the delivery of the latest broadband technologies and high quality voice service, requires significant use of fiber optic cable. Id. The Telco states that SPV and Project Pronto telephony services are contained on a single fiber sheath, and HFC fibers provision services to the Project Pronto remote terminals. Tr. 11/20/00, p. 89.

According to the Telco, the fiber portion of the network is not available for lease by another cable provider. Response to Interrogatory CATV-77. The Companies also state that a competitive cable provider seeking access to the Telco network would have to explain its network design to the Telco and jointly determine which services offered by the Telco would enable the envisioned service. Tr. 11/20/00. pp. 177 and 178. The Companies state that other Connecticut cable television providers currently use FCC Tariff 39 from the Telco in the provision of service, as does SPV in Tier 1 and Tier 2 of the HFC network. Tr. 11/20/00, pp. 76 and 269; Tr. 11/21/00, pp. 682 and 683; 560 and 561.

The Telco indicated a willingness to help create a network transport arrangement for a potential cable provider, but stressed that the provider would have to be forthcoming regarding its network design to assure compatibility between the infrastructures of the two companies. Tr. 11/20/00, p. 74 and 75, 175-178; Tr. 11/21/00, p. 484. The Telco also stressed that it is not required under state or federal law to allow a cable provider to collocate cable-associated equipment in Telco offices, and that it would not do so voluntarily. Tr. 11/20/00. pp. 75, 177 and 178, 282; Tr. 11/21/00, p. 484

E. CONNECTICUT TELEPHONE PROPOSAL

1. Application Summary/Docket No. 00-09-25

By application dated September 19, 2000, CTTEL requested that the Department transfer to CTBB SPV's CPCN as modified in the Modification Decision, to operate a CATV system or issue CTBB its own CPCN to operate a CATV system under the same terms and conditions contained in the SPV Revised Franchise Agreement, to serve the current SPV franchise area. As a condition to its Application, CTTEL requested that the Department compel transfer of the HFC-based network to CTTEL.

According to CTTEL, SPV's proposed "voluntary termination" of its CPCN implicates Conn. Agencies Regs. § 16-333-44.[35] CTTEL states that, pursuant to Conn. Agencies Regs. § 16-333-44, the Department must replace a franchisee with another franchisee, to protect the public from harm and inconvenience. In light of its application, CTTEL stated that the Department should require the Telco and SPV to “hand over the keys” of SPV to CTTEL. CTTEL September 19, 2000 Application, Part 2, page 2.

By motion to dismiss dated October 2, 2000 (October 2, 2000 Motion), the Companies asserted that the HFC-based network is the Telco's asset, and that SPV has never owned or built its own network, but instead has relied on the Telco's network infrastructure for delivery of cable services. The Companies stated that the Department would be acting beyond its statutory authority to unilaterally order the sale or transfer of the Telco's HFC network to CTTEL or any other party,[36] and that any such transfer would infringe upon the Telco's fundamental property rights protected by the federal and state constitutions.[37] The Companies recommended that the Department sever any consideration of the Telco's HFC network from CTTEL's September 19, 2000 application, and proceed only with a review of CTBB's CPCN application. October 2, 2000 Motion, pp. 2-13.

The Companies also stated that CTTEL has cited no provision in the Telecommunications Act of 1996 (Telcom Act), the Cable Act, or in Conn. Gen. Stat. § 16-1, et seq., as authority for its transfer request, and that CTTEL's reliance upon

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[35] Conn. Agencies Regs. § 16-333-44 states in part that "“[i]f a determination is made to terminate a franchise, the franchise shall continue in operation until replaced, or upon order of the [Department].”

[36] Citing Figueroa v. C & S Ball Bearing, 237 Conn. 1, 4 (1996), quoting Castro v. Viera, 207 Conn. 420, 427-30 (1988).

[37] Conn. Gen. Stat. § 16-43; 47 U.S.C. § 251; Citino v. Redevelopment Agency of City of Hartford, 51 Conn. App. 262, 278 (1998); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Citino, 51 Conn. App. at 277; and Cohen v. Hartford, 244 Conn. 206, 220 (1996).

Conn. Agencies Regs. § 16-333-44 is misplaced. Finally, the Companies stated that, because no CTTEL affiliate currently has a CPCN to provide cable service in Connecticut, the Department must consider CTBB's suitability pursuant to Conn. Gen. Stat. § 16-331 before exerting jurisdiction over CTTEL's Application. Id.

By letter dated October 11, 2000, the Department welcomed CTTEL's proposal to seek a CPCN to offer competitive CATV services and indicated that it would consider CTTEL's Application in Docket No. 00-09-25, Application of Connecticut Broadband, Inc. for a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service. Simultaneously, the Department denied the Companies' motion to dismiss CTTEL's application.

However, because CTTEL's proposal was conditioned upon a transfer to CTTEL of the network used by SPV to deliver cable services, the Department found that CTTEL's application was unripe for review.[38] The Department noted that CTTEL had been designated as an intervenor in the instant docket, would be allowed to pursue its claims regarding the continuing viability of the Companies' HFC network for cable and telephony, and its rights to acquire the HFC network, in this proceeding. The Department stated that, upon demonstration that CTTEL has the legal rights and financial means to acquire the HFC network, the Department would then begin processing CTTEL's CPCN Application. Department Letter dated October 11, 2000 in Docket No. 00-09-25.

During the course of the instant proceeding, CTTEL refined its position and requests that the Department make specific findings, summarized as follows:

a) SPV must continue providing video services and comply with the terms of its Revised Franchise Agreement until the agreement is transferred to a suitable successor;

b) SPV must transfer all video-related equipment to the suitable successor, CTTEL;

c) The Telco must allow the suitable successor to collocate video equipment on Telco property, at the current locations and under the same terms and conditions as SPV currently locates its equipment, during a transition period;

d) The Telco must provide nondiscriminatory access at reasonable rates and terms, via tariff, to all services and equipment currently being used by SPV and supplied by the Telco that are not being transferred to the suitable successor; and,

e) The suitable successor must be provided with pole attachment rights on the same or equivalent terms as the Telco. CTTEL Brief, pp. 5-8,15, 27-30.

As noted above, CTTEL believes that the Department is required to seek a replacement franchisee for SPV, and require the transfer of SPV's assets and existing franchise agreement to CTTEL pursuant to Conn. Agencies Regs. § 16-333-44. CTTEL

[38] CTTEL also requested that the Department allow it to acquire SPV's Franchise Agreement, as modified by the Department's Modification Decision.

states that the Department is authorized by Conn. Gen. Stat. § 16-331 and its Revised Franchise Agreement with SPV to revoke SPV's franchise for due cause. CTTEL Brief, pp. 11-15. According to CTTEL, the Companies' anticipatory repudiation of the Revised Franchise Agreement and its actions in the marketplace, such as its limited penetration and low growth rate, constitute such due cause, pursuant to Conn. Gen. Stat. § 16-10a. According to CTTEL, the Department may therefore effect a transfer of the cable franchise and the cable system as a means to ensure continuity of service. CTTEL Brief, pp. 13-16.

CTTEL also states that federal and state law require the Department to maintain service to existing customers by requiring the Companies to transfer the Revised Franchise Agreement to a suitable successor and provide the suitable successor fair and nondiscriminatory access to the extant service delivery platform used by SPV. To facilitate a smooth transition from SPV to a suitable successor, CTTEL suggests that the Department condition its revocation or modification of the Revised Franchise Agreement on the above noted conditions.[39]

CTTEL states that the FiberVision Decision[40] is relevant to the current docket only because the Department initiated a revocation proceeding before accepting FiberVision's "return" of its franchises. CTTEL states that FiberVision, unlike SPV, had not yet begun to provide service in its franchise areas and that the Department revoked FiberVision's franchise because FiberVision could not obtain start-up capital. Once revoked, CTTEL states that the Department did not need to provide for continuity of service because service had never started in the first place. CTTEL Reply Brief, pp. 5 and 6.

CTTEL requests that the Department order the Telco to allow collocation of video-related equipment transferred from SPV to the suitable successor. According to CTTEL, such an order would not compel the Telco to allow other cable operators to collocate video-related equipment because no other cable operator would be similarly situated to SPV's suitable successor in that it alone would have to provide continuity of service to customers during a transition period. CTTEL Brief, pp. 29 and 30.

2. Positions of Other Participants

The Companies state that, while the Department's power to revoke a franchise may be more often exercised on recalcitrant CATV operators, nothing in Connecticut

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39 Specifically, CTTEL states that the Companies should be required to continue to provide service until SPV's Revised Franchise Agreement is transferred to a suitable successor; a transfer of video-related equipment from the Companies to that successor at fair market value is negotiated; collocation of video-related equipment on Telco property at agreed terms is accomplished; nondiscriminatory access at reasonable rates and terms, via tariff, to all services and equipment used by SPV and supplied by the Companies but transferred to the suitable successor is provided; and finally, the suitable successor acquires pole attachments rights on terms equivalent to those of the Telco.

40 September 24, 1997 Decision in Docket No. 97-07-05, DPUC Investigation into Whether the Certificates of Public Convenience and Necessity of FiberVision Corporation of Greater Hartford, FiberVision Corporation of New Haven, FiberVision Corporation of New Britain and FiberVision Corporation of Bridgeport Should Be Revoked (FiberVision Decision). In that Decision, the Department allowed FiberVision to relinquish its four CPCNs to provide cable services.

law prevents the Department from accepting a CATV operator's voluntary surrender of its CPCN. Application, p. 14. The Companies also state that CTTEL's reliance on Conn. Agencies Regs. § 16-333-44 is misplaced, primarily because the regulation, effective June 27, 1989, was adopted along with several other Department regulations governing orderly renewal of CATV franchises, pursuant to Public Act 88-202, which added several sections to Conn. Gen. Stat. § 16-331. October 2, 2000 Motion to Dismiss; Companies' Brief, pp. 38-42.

In support of claims that the Department may accept a CATV operator's voluntary surrender of its CPCN, the Companies note that the Department did so in the FiberVision Decision. In that proceeding, FiberVision informed the Department that it sought to relinquish its CPCNs because of funding issues, changes in the marketplace, and delays resulting from litigation. The Companies note that the Department accepted FiberVision's four CPCNs, in part because the FiberVision franchise areas would continue to be served by at least one certified CATV operator, as would be the case upon an SPV market withdrawal. Application, pp. 14 and 15.

The Companies strongly oppose any claim by CTTEL for transfer of the network used by SPV. Most importantly, the Companies state that that there is no cable television network to transfer because, for delivery of its cable services, SPV has always relied upon an HFC network owned by the Telco and paid for by shareholders.[41] Companies Brief, pp. 33-37; Tr. 11/20/00, p. 60 and 175. The Companies characterize CTTEL's request as an attempt to seize the Telco's assets. Tr. 11/20/00, p. 60. The Companies insist that nothing in Conn. Gen. Stat. § 16-43, or elsewhere, authorizes the Department to initiate or order the disposal or sale of the Telco's HFC network. Similarly, the Companies state that no provision in the Telcom Act[42] expressly provides the Department with jurisdiction to assign, sell or order the involuntary transfer of its network, or portions thereof, to third parties for cable TV services. Companies' Brief, pp. 34-38. According to the Companies, if the Department transferred the Telco's HFC network to a third party, such an action would constitute a taking of the Telco's property.[43]

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[41] Citing, e.g., Docket No. 95-06-17, Application Of The Southern New England Telephone Company For Approval To Offer Unbundled Loops, Ports And Associated Interconnection Arrangements, Decision, December 20, 1995 (discussing the Telco's development and cost allocation of the HFC network); New England Cable Television Association, Inc. v. Department of Public Utility Control, No. CV 970571302, 1998 WL 481744 at * 6-7 (Conn. Super. Aug. 4, 1998 (McWeeny, J.) (reviewing several Department Decisions concerning the Telco's HFC network).

[42] Citing Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §151, et. seq.

[43] In support of this view, the Companies state that the Fifth Amendment to the United States Constitution and Article I, Section 11, of the Connecticut Constitution provide that private property, such as the Telco's HFC network, cannot be taken for public use without just compensation. Citino v. Redevelopment Agency of City of Hartford, 51 Conn. App. 262, 278 (1998). The Companies also state that both the Connecticut and United States Supreme Courts recognize that a taking may occur without an actual or physical appropriation of property by the government. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Citino, 51 Conn. App. at 277. Such a taking, known as an inverse condemnation, includes instances in which the government effects a taking through regulations or other acts short of condemnation or eminent domain proceedings. Cohen v. Hartford, 244 Conn. 206, 220 (1996).

Regarding CTTEL's offer to pay fair market value for the HFC network, the Companies state that the government must pay compensation to the property owner for any such taking.[44] Moreover, the Companies claim that CTTEL's property transfer request on its face fails the public use requirement of takings jurisprudence.[45] October 2, 2000 Motion to Dismiss. Only those aspects of the coaxial cable and portions of the network used exclusively for the provision of cable television services might be offered for sale, according to the Companies. Tr. 11/20/00, p. 73.

The Companies state that SPV is losing money at such a rate that it cannot afford to remain in business and is unwilling to await a potential suitor's acquisition of a CPCN, especially upon consideration of the level of contention that surrounded SPV's CPCN application. Tr. 11/20/00, p. 176; Companies' Reply Brief, pp. 23-30; Response to Interrogatory CATV-9; Late Filed Exhibit No. 2. The Companies also state that any order by the Department requiring SPV to remain in the CATV business for any period of time would also constitute an unconstitutional regulatory taking.[46] Companies' Reply Brief, pp. 18-21. According to the Companies, a Department order requiring SPV to continue its cable services would force SPV to incur continued losses without compensating SPV for the cost of providing those services, and would potentially expose SPV to millions of dollars of additional construction costs for buried cable and service to multiple dwelling units.[47] The Telco states that parallels to Pennsylvania-Reading include the facts that SPV only provides its service to a relatively small fraction of Connecticut CATV consumers, and other adequate means exist for the public to receive the video services at issue. The Companies state that there is no overriding public need to require a public utility such as SPV to continue operating at a loss, and to order otherwise would be arbitrary, unjust and unreasonable, and amount to a deprivation of property in violation of both the state and federal constitutions. Companies' Reply Brief, citing Pennsylvania-Reading, 74 A.2d at 270.[48]

The Companies also state that the state’s “police power,” as described by CTTEL, allowing the Department to order SPV to remain in business or to transfer the Companies’ assets to CTTEL is unavailing. Companies Reply Brief, pp. 19-22, citing

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[44] Citing Cohen, 244 Conn. at 220

[45] Citing Northeastern Gas Transmission Co. v. Collins, 138 Conn. 582, 593 (1952) (holding that the power to take is “restricted to that which will reasonably serve the public use; more than that would, in effect, be a taking for private use and hence, illegal as an abuse of power”).

[46] Citing Brecciaroli Connecticut Commissioner of Environmental Protection, 168 Conn. 349, 354 (1975) (finding that that governmental action in the form of regulation can be so onerous as to constitute a taking). See also Pennsylvania Reading Seashore Lines v. Board of Public Utility Comm’rs, 5 N.J. 114, 74 A.2d 265 (1950), certiorari denied, 340 U.S. 876, 71 S.Ct. 122, 95 L.Ed. 637 (1950) (Pennsylvania-Reading) (holding that railroad company had the constitutional right to discontinue passenger train service and finding that Commission order requiring railroad to continue furnishing passenger service deprived it of its property in violation of the due process clauses of the state and federal constitutions).

[47] As noted above, appeal of the requirement to provide buried/multiple dwelling unit service is pending before the Superior Court.

[48] The Companies argue, contrary to the AG’s suggestion, that the Department cannot ignore the potential unconstitutional effect of its orders. See AG Brief, pp. 25 and 26. Connecticut law provides that a reviewing court cannot sustain any Department decision or order that is “[i]n violation of constitutional or statutory provisions” or “in excess of the statutory authority of the agency.” Conn. Gen. Stat. § 4-183(j).

CTTEL Brief, pp. 6, 28 and 29. According to the Companies, as a threshold matter, the Department's "police power" to issue such orders, if it exists, must derive from some explicit grant of authority.[49] The Companies insist that the Department has no specific grant of authority to compel an involuntary sale or transfer of the Companies assets to CTTEL or to require SPV to continue its business. Id.

Additionally, the Companies argue that CTTEL's request that the Department compel collocation and require the Companies to file tariffs for video services and equipment runs afoul of federal cable law and policy because, through its "conditions," CTTEL wants the Department to transform the cable marketplace into an industry governed by the same regulatory scheme set forth in the Telcom Act. That is, CTTEL seeks to impose the Telcom Act's Section 251 requirements on cable services and providers in conflict with, and preempted by, the Cable Communications Policy Act, 47 U.S.C. §§ 521-614.[50] Companies' Reply Brief, pp. 21 and 22. The Companies claim that imposition of CTTEL's conditions would conflict with 47 U.S.C. § 541(c), which states that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service," and expressly abolishes the power of states to regulate cable systems as public utilities. Id.

According to Cablevision, the Department cannot and should not force a franchised CATV operator to remain in business when that business is no longer commercially practicable and the CATV operator seeks to voluntarily relinquish its franchise and exit the business. Cablevision supports SPV's right to voluntarily relinquish its CPCN, particularly where continuation of the franchised operations is shown to be commercially impracticable as the Telco claims. Cablevision Brief, p. 1.

Cablevision asserts that exclusive reliance on Conn. Agencies Regs. § 16-333-44[51] by CTTEL, the AG and the OCC to support CTTEL's argument that the Department has the authority to compel the Telco to continue providing CATV service until a replacement franchisee is legally and physically able to assume those obligations, is misplaced. Cablevision agrees with the Companies that Conn. Agencies Regs. § 16-333-44 is not applicable to the instant proceeding and grants the Department the power to order that a CATV operator continue its operations until a replacement franchisee is able to assume those responsibilities only in the context of a renewal proceeding. Id., pp. 2-8.

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[49] Citing e.g., Lucking v. Detroit & Cleveland Navigation Co., 265 U.S. 346 (1924) (holding that there must be some statutory authority by which a regulatory body is empowered to require a regulated entity to continue operations; and that absent such authority, such entities are free to choose to discontinue operations); Cohen v. City of Hartford, 244 Conn. 206, 218-19 (1998) (finding that state had the statutory right to exercise its police powers to regulate travel upon public highways).

[50] The Companies cite 47 U.S.C. § 556(c), noting that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."

[51] Instead of any provision of the Telcom Act, 47 U.S.C. § 151 et. seq., Conn. Gen. Stat. § 16-247b(a), Conn. Gen. Stat. § 16-331, or any other provision of the Department's enabling legislation, Conn. Gen. Stat. § 16-1, et seq.

Cablevision and NECTA state that the Department should decline to order SPV to continue its CATV operations until a replacement franchisee is ready to assume those obligations, even if the Department concludes that it has the legal authority to do so, citing the precedent created by the FiberVision Decision. Cablevision Brief, pp. 7 and 8; NECTA Brief, pp. 7-9.

NECTA notes that none of the Department's regulations preclude the Department from accepting a relinquished CPCN, and no regulation imposes conditions upon an operator such as FiberVision, that voluntarily relinquishes a CPCN. According to NECTA, Conn. Agencies Regs. § 16-333-44, the exclusive source of legal authority cited by the opponents of the Companies' plan, applies only in the situation wherein the Department has denied a request for renewal of a CPCN. NECTA Brief, p. 7. NECTA notes that SPV has not flouted Department orders in a manner that would justify revocation proceedings nor has it sought permanent modifications to remain in business. Id.

NECTA concurs with the Companies that to deny a CATV operator the right to seek to exit, and require it to remain in the cable television business indefinitely, would almost certainly constitute an unconstitutional taking of private property without just compensation, and a ruling that a cable operator must stay in business indefinitely also would likely violate the federal prohibition on regulating a cable television operator as a utility, 47 U.S.C. 541(c). NECTA Brief, pp. 7 and 8. NECTA states that compelling an operator to remain in the cable business, against that operator's wishes, until another provider can be found to take over the CPCN is inconsistent with the goal of establishing a regulatory environment that encourages investment in Connecticut. NECTA also states that if the Department decides to transfer the Telco's assets or SPV's CPCN to CTTEL, the Department should expressly condition such transfer on CTTEL's compliance with CPCN requirements and other applicable state laws and regulations and reserve the right to modify the terms and conditions of such transfer based on the results of the subsequent proceedings, including Docket No. 00-09-25. Id., pp. 8-11.

NECTA questions whether transferring SPV's CPCN, as modified in Docket No. 99-04-02, would comply with Conn. Gen. Stat. § 16-331(g), franchise parity requirements, or with other applicable laws, regulations or precedent, because the Department only authorized the modifications temporarily, and based on the Companies' showing of commercial impracticability. NECTA Brief, pp. 11 and 12. NECTA also notes that no ruling has been made as to whether CTTEL has the managerial, technical and financial qualifications to obtain a CATV CPCN in Connecticut. Id. NECTA opposes requests for forced transfer of the telephone and cable assets, and SPV's Franchise Agreement, as revised, to CTTEL because CTTEL failed to present a direct case explaining the legal basis that would authorize the Department to take such an action. Id.[52]

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[52] NECTA requests that, to the extent the Department believes it has authority to order asset sales or transfers based on SNET's unique status as an incumbent local exchange carrier, the Department's order clearly state the basis for such authority in telephone, rather than CATV, laws and precedents.

The AG does not support SPV's request to relinquish its CPCN, because SPV took risk of leasing plant from the Telco, who had other uses in mind for that plant. AG Brief, p. 16 citing the Department's September 25, 1996 Decision in Docket No. 96-01-24, p. 30. The AG maintains that SPV therefore assumed the risk that the technology may not work out for every last one of the Telco's other intended uses, and cannot now be absolved of its service obligations. The AG states that SPV is a franchise holder, and as such is subject to all laws and regulations that apply to all franchises and their holders, including Conn. Agencies Regs. § 16-333-44. Id., pp. 19-22. The AG also states that the Companies oppose allowing any other entity to own or operate the HFC network because they seek to minimize future competition. AG Brief, p. 15. The AG then states that Conn. Gen. Stat. § 16-10a is applicable, and the Department may revoke SPV's franchise. According to the AG, Department determinations regarding any takings argument are not yet ripe for review and should not be addressed at this time. AG Brief, pp. 24 and 25.

The OCC believes that the Department should require the Companies to sell or lease the HFC network to a suitable successor at fair market value, upon the granting by the Department of a CPCN to the suitable successor. The OCC states that no "taking" can occur if just compensation is provided. OCC Reply Brief, p. 9. The OCC also states that the Department's FiberVision Decision is not applicable to the instant proceeding because FiberVision never built any plant or served any customers and no community needs assessment as required by Conn. Gen. Stat. § 16-331(f) was conducted. In contrast, SPV serves customers in many towns and has built plant to serve those customers. OCC Reply Brief, pp. 7 and 8.

The OCC believes that the Department is empowered by Conn. Agencies Regs. § 16-333-44 to require that SPV continue to serve its existing customers until a successor is identified, and believes that the Department should exercise that discretion to protect SPV's existing customers and to keep alive the hope of cable competition in Connecticut. OCC Brief, pp. 9-11.

The Statewide Advisory Council states that because CTTEL's application in Docket No. 00-09-25 is not yet ripe, the Department should encourage good faith negotiations for the sale of the Telco's cable network or the lease of video bandwidth. The Statewide Advisory Council also encourages the Department to consider a delay in the instant proceeding to ensure that all possible opportunities for sale or lease of facilities have been explored. Finally, the Advisory Council requests, in the interests of competition, that the Department require SPV to stay in business until a new provider is ready to assume SPV's Franchise Agreement obligations. Statewide Advisory Council Brief, pp. 1 and 2.

3. Department Analysis of the CTTEL Proposal

Some participants have suggested that the Department has the authority, pursuant to Conn. Agencies Regs. § 16-333-44, to require SPV to continue providing service until SPV's operations are transferred to a successor. The Department has closely reviewed the history of Conn. Agencies Regs. § 16-333-44 and finds that this regulation is intended to apply only in those cases in which the Department decides not to renew an existing CPCN for cause, such as failure to comply with Franchise

Agreement terms. In such instances, Conn. Agencies Regs. § 16-333-44 authorizes the Department to require an incumbent operator to remain in operation "until replaced, or upon order of the [Department]," so that public access to CATV service is uninterrupted. Every area that SPV serves is also served by an incumbent cable operator, so that public access to CATV service, competitive issues aside, is unhampered if SPV withdraws from the marketplace. Moreover, SPV's actions do not constitute due cause for revocation and SPV used appropriate means to obtain modification of its Franchise Agreement in Docket No 99-04-02. Conn. Agencies Regs. § 16-333-44 is not applicable to the instant proceeding. This proceeding is not a renewal or revocation proceeding nor is it a franchise modification proceeding pursuant to 47 U.S.C. § 545.

SPV continues to lose money, and rational, conservative financial review of its prospects indicates that is likely to continue to do so. Even if no unconstitutional or regulatory taking concerns were invoked, the Department would be unwilling to require that SPV remain in business for an unspecified period of time, awaiting an unknown suitor. As a practical matter noted by NECTA, a cable operator compelled to stay in business against its wishes likely lacks the motivation or ability to continue to offer high quality services to its customer base.

For the reasons listed above, and in the interests of fostering a pro-competitive cable marketplace in Connecticut, the Department is disinclined to force SPV to stay in business. The commercial impracticability test has been met, and continues to be met. A requirement that SPV stay in business and perpetuate financial losses might dissuade a would-be competitor contemplating market entry, or franchise area expansion. The Department must ensure, however, that any such market exit is fair to subscribers, be as least disruptive as possible, and is consistent with a competitive, level playing field concept.

With respect to disposition of SPV assets, the Companies plan to sell SPV's assets, including video-related equipment, following SPV's cessation of business. The Department has the means to ensure that such a process is undertaken in a timely, orderly and fair manner. However, CTTEL's proposal goes beyond acquiring such equipment in a negotiated or bid process and instead requests transfer of the equipment, and the right to operate it where it presently resides, within Telco buildings.

The record supports the Companies' position that, aside from coaxial cable and other cable television-only portions of the network, there is no cable television "network" to transfer to a third party, and no pole attachment rights to provide. Any such action by the Department would almost certainly invoke claims of taking. Additionally, any such "suitable successor" would need to acquire a CPCN from the Department prior to providing any cable services in Connecticut. CTTEL's interest in acquiring the SPV franchise is clear, but its CPCN proposal is conditioned upon acquisition of SPV's Franchise Agreement, as modified in Docket No. 99-04-02. CTTEL's ability to operate as a cable provider is unknown, and moreover, a transfer of SPV's modified franchise agreement to CTTEL, or some other third party, would unquestionably raise concerns regarding level playing field requirements.[53] For example, CTTEL would have the Department transfer SPV's Franchise Agreement (as previously modified by the

[53] See Conn. Gen. Stat. § 16-331(g).

Department due to commercial impracticability) to CTTEL, but would propose to not build out the network, not provide service to multiple dwelling units, and not serve areas with underground utilities. CTTEL Application, pp. 2, 7, 8, 15 and Application, Part II, pp. 2-5.

The Companies stated that nondiscriminatory access to the Telco's network, at tariffed rates and terms, is utilized by SPV and other Connecticut cable operators in the provision of cable services. However, without details regarding a future cable operator's network, the Telco could not guarantee that tariffed arrangements would provide that operator with end-to-end connectivity. The Telco adamantly refused to provide any cable operator with collocation rights that would be necessary to provide service in a manner identical to SPV. The Department will reserve judgement on the claim that collocation requirements would violate 47 U.S.C. § 541(c), and will attempt to develop a solution to foster cable competition.

4. Competitive Alternative

As noted above, the Telco is willing to assist in developing a network transport arrangement for a potential cable provider. Implicit in the Telco's willingness is the assumption that collocation would not be required by the CATV operator. The Department notes that, headend equipment siting issues aside, first and second tier transport is presently available via the Telco's FCC Tariff 39, the Multichannel Video Service Tariff providing dedicated point-to-point transmission over the Telco fiber optic facilities at generally available terms and conditions to any provider. It is the opinion of the Department that an extension of those same conditions to the third tier of the network, beginning at Telco end offices and ending at individual service addresses would be beneficial and would facilitate further development of alternative service provisioning schemes in Connecticut. In spite of the merit that such a policy might engender the Department is not in a position to order any such change in this proceeding. Any proposed change to the collocation and unbundling requirements of the Telco must be considered within the context of Public Acts 94-83 and 99-222 and The Telecommunications Act of 1996. Furthermore, it must provide opportunity for as many affected parties – CLECs, ILECs, IXCs, ISPs, etc. – to offer evidence and opinion on any proposed change to current policy.

In the absence of any formal requirement for the Telco to liberalize its collocation and unbundling policies, the Department encourages the Telco to work with prospective video services providers interested in acquiring more technical services and support than the Telco's currently tariffed services offer. The Department fully understands that limits of the Telco's legal obligation under federal law to support unbundling and collocation, but the Department also believes that it has independent authority under Conn. Gen. Stat. §§ 16-247a(a)(2), 16-247b(b), and 16-247k(b)(4) to pursue such measures as it deems necessary to achieve the expressed goals of the Connecticut General Assembly in Public Act 94-83. Therefore, the Department encourages the Telco to work and negotiate in good faith with any party interested in developing such an arrangement (i.e., complete end-to-end connectivity), and would expect any party aggrieved with the Telco's failure to do so, to formally notify the Department. Upon such a showing, the Department will be compelled to consider a generic investigation to update and review implications of collocation and advanced service policies pursuant to provisions and current interpretations of the Telcom Act.

To ensure that the Telco takes no action, with respect to disposition of any piece of the referenced network or assets that may be subject to a claim that the Companies are thwarting competition, the Department will order the Companies to develop an organized disposition plan, subject to Department approval, prior to the sale, transfer or removal of any SPV assets or pieces of the HFC network used by the Telco or SPV in the provision of cable-related services, as described above.

F. MARKET EXIT PLAN

1. Plan overview

SPV proposed a market exit plan that includes provisions for customer education and outreach, issuance of a subscriber credit to defray costs of installing non-SPV service, and customer service modifications.

Concurrent with the filing of its Application, SPV mailed to its customers a letter outlining SPV's business intentions. Application, Exhibit B. As proposed, SPV would again send a letter to each of its customers at the conclusion of the instant proceeding confirming that SPV is exiting the CATV marketplace and that the last date of service will be 90 days from the date of the letter, the interim period being a three-month "transition period" in which SPV customers would have to arrange for the installation of an alternative video service. To help offset the additional installation costs that may apply, SPV would issue a $40 credit on the final bill of each customer in good standing[54] upon disconnection from SPV's service. Application, pp. 16-19.

SPV would send two separate notices to customers each month during the transition period; one via bill insert and the other via first class mail. Each would contain a reminder of the final day of SPV service, instructions on how to contact the incumbent cable provider, and answers to frequently asked questions. SPV would also have informational crawls on The Weather Channel, and a recorded message on its incoming phone lines. Application, p. 18.

SPV's two current store locations in West Hartford and Fairfield would remain open, and an additional location for equipment drop-off in the New Haven area would be added. SPV also plans to increase customer service staffing in an effort to reduce customer inconvenience and hold time. During the final 30 days of SPV's CATV service, SPV staff would call customers who have not yet scheduled disconnects. The SPV staff would encourage remaining customers to schedule an installation date with their choice of alternate video provider as soon as possible to avoid any lapse in their video services upon SPV's market exit. Application, pp. 18 and 19.

Upon issuance of a Department final decision approving SPV's Request to Relinquish, SPV plans to cease its Pay-Per-View (PPV) offerings during the first month

[54] For purposes of the $40 credit, SPV defines a subscriber in good standing as a customer that has an active, non-disconnected, SPV account.

of the transition period so that all PPV buys will appear on customers' bills prior to issuance of their final bills. Application, p. 19.

2. Subscriber credit

The Companies state that the proposed $40 credit figure was determined by examining what other cable companies, including AT&T, Cablevision, Cox, Charter and Comcast, charge for reconnection, and was developed to help defray those costs. Response to Interrogatory CATV-49; Tr. 11/20/00, p. 101 and 223.

The AG criticized the Companies for proposing a credit amount that falls below the amount that SPV charges for its own most basic installation. AG Brief, p. 27 citing the Companies' Response to Interrogatory CTTEL-6; Tr. 11/20/00, p. 224. The OCC, too, believes that $40 is insufficient to accomplish the stated purpose. OCC Brief, p. 11.

The Department finds that Company did not consider relevant cost factors such as additional outlets, typical in a contemporary household where more than one television set is customary. Review of cable tariffs indicates an average figure for a prewired home installation and two outlets to be in excess of $50 when averaged among the pool of cable operators selected by the Companies. SPV's own standard installation charge, absent any additional outlets, is $42.95. Tr. 11/20/00, pp. 224 and 225.

Forty dollars is less than the tariffed installation rate that would be applicable to an average subscriber in almost all realistic scenarios. The Department believes that the credit should be increased to a minimum of $50 in light of the likelihood of additional outlet costs and certain inconvenience associated with arranging for a new installation, including adjusting one's personal and work schedules to accommodate installation activity.

SPV originally planned to require subscribers to disconnect and return any SPV equipment, such as converters and remotes, in the home. Responses to Interrogatories CATV-41 and CATV-88. The Companies later revised this aspect of the exit plan to provide subscribers with free mailers to be used for this purpose. Tr. 11/20/00, p. 58. The Department expects that these mailers will automatically be provided to all equipment-leasing subscribers for all subscriber-leased equipment so that the additional inconvenience of an otherwise unnecessary trip to an SPV office may be avoided.

The Application included details regarding the Company's credit proposal; SPV's customer notice did not. Response to Interrogatory CATV-37; Application, Exhibit B. Department records[55] and the Companies' testimony reveal that thousands of subscribers, who might otherwise have been eligible for the credit, have left SPV in the interim period. Tr. 11/20/00, p. 446. It appears likely that, upon notice of SPV's planned market exit, some subscribers may have been prompted to begin to seek out and connect to, alternative video service providers. The Companies acknowledge that customers have little motivation to remain with a provider whose future is uncertain. Companies' Reply Brief, p. 21. These findings compel a requirement that the

[55] Monthly reports filed pursuant to Conn. Agencies Regs. § 16-333e.

Companies expand their credit proposal to include all subscribers who were on the SPV system as of August 11, 2000, in addition to those subscribers eligible for the credit upon disconnection from SPV's service. The Department requires that the Companies will expend their best effort to locate all credit-eligible former subscribers.

With regard to disconnection, the Department is concerned that the Telco may have overestimated its ability to concurrently maintain routine telephony activities such as customer service, plant maintenance, installation and upgrade activities, while at the same time, requiring that same staff to disconnect all SPV subscribers, and install new DBS services. Tr. 11/20/00, pp. 104-106. The Companies state that SPV subscriber disconnects will be performed on weekends and overtime will be available, as needed. Id. The Companies also state that SPV subscribers do not have to be at home at the time of disconnect, and that billing would cease upon the customer's request for disconnect. Tr. 11/20/00, p. 108. Nevertheless, the Department has concerns that because SPV has not met with incumbent cable operators to discuss SPV's exit from the marketplace and issues concerning subscriber switchover, customer access to video services may be disrupted during the transition period. Response to Interrogatory CATV-52; Tr. 11/20/00, p. 226. The Department's Consumer Services Unit will closely track the Companies' performance during the transition period and the Companies will be held accountable for any shortcoming, including telephone accessibility.

3. Non-Standard installations

SPV required that service addresses far from the road or served by underground facilities pay a non-standard installation rate because of the increased costs associated with such installations. To date, 501 SPV customers have paid for non-standard installations in the aggregate amount of $15,626.01. The largest amount paid by an individual customer was paid by a commercial account in the amount of $1,625.00. Responses to Interrogatories CATV-47, CATV-49 and CATV-92. SPV's last customer acquisition campaign occurred in June 2000 to promote the launch of the East Haven wire center, and marketing ceased altogether concurrent with the filing of the Application. Response to Interrogatory CATV-22; Tr. 11/20/00, p. 446.

The Department finds that the SPV customers who paid non-standard installation charges did so with full expectation that SPV would remain in business, and are entitled to a full refund of those installation charges, especially given the magnitude of some of those charges. SPV will be directed to modify its exit plan to provide these subscribers with the following options: subscribers may direct that the non-standard drop be transitioned to the incumbent cable operator for reuse, or the subscribers may elect for full reimbursement of non-standard installation charges paid to SPV. SPV must prepare, as part of its customer notice plan, a letter to each of its customers served by a non-standard installation advising the subscriber of these two options, and directing subscribers to choose no later than June 30, 2001. Any customer who chooses the reimbursement option should be issued a check as soon as possible, but in no event later than thirty days after notice to the Companies.

4. Drop-specific issues

The Companies state that they have reached no proposed disposition regarding subscriber coaxial cable drops, but have no immediate plans to either abandon or remove them. The Companies also state that drops will be removed upon subscriber request, at no charge to the subscriber, and that subscribers will be so notified as part of SPV's market exit. Responses to Interrogatories CATV-45 and CATV-89; Tr. 11/20/00, p. 97. According to the Companies, final disposition of subscriber drops is likely to be compatible with the coaxial portion of the HFC plant. Id.

The Companies acknowledge that SPV drops are compatible with incumbent cable operator's plant, but state that it would be premature to transition those drops to the incumbent operator. Tr. 11/20/00, pp. 97 and 98; Responses to Interrogatories CATV-46 and CATV-47. However, if an SPV subscriber is served by a buried drop, the Companies would transition that subscriber drop for re-use by the incumbent, rather than abandoning or destroying it. Tr. 11/20/00, pp. 102 and 103.

The Department believes that SPV should amend the market exit plan to provide an option whereby all service drops, aerial or buried, may be transitioned in place to the incumbent operator for CATV reuse by the served customer at no charge. If the drop is not so transitioned, SPV may leave it in place for possible reuse in the future, provided that the resident retains the right to request future removal of such a drop at no charge.

G. COMMUNITY ACCESS

SPV proposes to provide one additional year of community access funding to each SPV-affiliated community access provider, based on SPV subscribership as of August 11, 2000. Application, p. 20; Tr. 11/20/00, p. 243. This additional funding would be distributed at the closing of the CATV business, and would give the community access providers time to revise their budgets as subscribers migrate from the SPV system. Id. The transition period proposed by the Companies would result in payment being issued in May 2001, plus one additional year of funding. Tr. 11/20/00, pp. 112 and 113.

According to the Companies, no commitment to any educational or governmental representative or facility will go unfulfilled if it withdraws from the cable market, nor are there any present commitments to community access groups that will go unfulfilled prior to SPV's withdrawal from the cable market. Responses to Interrogatories CATV-58, CATV-60, CATV-61, and CATV-94.

The Department has reviewed SPV's proposed community access funding plan, and finds it to be well-suited to meet SPV's goal of ensuring a smooth funding migration for its community access affiliates during and after the transition period. The Department notes that the Statewide Advisory Council has requested that plant and equipment used by authorized third party community access providers remain in place. The Department urges the Companies to consider the Statewide Advisory Council's request in the most favorable light and to solicit and value its input regarding appropriate disposition of any community access equipment and plant made available by SPV. The Department expects that the Companies will comply with BCTV's relocation request, as stated. Tr. 11/20/00, pp. 114 and 115.

H. ADVISORY COUNCIL

The SPV Advisory Council has proposed to continue to subsist following SPV's market withdrawal, in anticipation of a potential successor to SPV. The Department finds merit in the Advisory Council's proposal and hereby approves it. SPV's Advisory Council has actively and meaningfully participated in numerous cable-related proceedings before the Department. The Department acknowledges and appreciates the efforts expended by this volunteer body in matters affecting SPV.

I. DBS OFFERING

The Telco states that it continues to recognize the importance of a video component in its product mix, and plans to join other SBC companies that now offer DBS in conjunction with DirecTV, a DBS provider, to meet that need. Application, pp. 21-23; Tr. 11/20/00, p. 171. The Telco notes that DBS is not a CATV service, but rather is entertainment programming delivered in digital format via satellite. The Telco acknowledges that its planned DBS offering is unregulated by the Department, but provided information about the offering for informational purposes. Application, pp. 21-23.

According to the Telco, CATV providers and DBS companies view each other as competitors, predominantly because of the relative comparability of programming offerings. However, the Telco notes that local channels are not currently available via DBS throughout all Connecticut markets, and no firm date for statewide local channel availability is available.[56] Id.; Responses to Interrogatories CATV-27 and CATV-34.

The Telco plans initially to launch DBS to SPV customers residing in the 26 Connecticut towns currently served by SPV, offering them a special, but undisclosed, promotional rate. Id.; Response to Interrogatory CATV-35. The Telco later plans to introduce DBS in other areas of the state. Tr. 11/20/00, pp. 109; 227-229; Response to Interrogatory CATV-31.

The OCC, the Statewide Advisory Council and the AG were all critical of the Companies' DBS plan. OCC Brief, pp. 5 and 6, 11 and 12; AG Brief, pp. 11 and 12, 28-30; Statewide Advisory Council Brief, p. 1. The AG notes that the Telco's DBS will reduce the pool of community access funding as former SPV subscribers are pulled away. The AG also notes that the DBS offer is not an adequate substitute for competitive cable service because it is unknown if the Telco DBS will be made available to most consumers in Connecticut, how long any offer will be open, or how long the Companies will remain in the DBS business. AG Brief pp. 28 and 29, citing Tr. 11/20/00, p. 229; Response to Interrogatory CATV-28. In addition, the AG notes that

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[56] In those Connecticut markets that do not have local channel access through DBS, the Telco plans to offer for customer purchase an "Off Air" antenna to receive local channels and to provide installation of the antenna. Customers would also be able to purchase an antenna from a local retailer and perform the installation themselves.

topographical limitations make DBS unavailable to some residents, and that the Telco is prohibited from offering DBS at all in 42 zip code areas of Litchfield County. AG Brief, p. 29, citing Tr. 11/21/00, pp. 389-391; Response to Interrogatory CATV-34. The AG also notes that the Companies' DBS proposal includes no community access programming, and all customer service will be provided out of Texas. AG Brief p. 29, citing Tr. 11/20/00, pp. 229 and 230; Responses to Interrogatories CATV-36 and CATV-84.

The OCC believes that the Department should, if it does not require SPV to remain in business until a successor is identified, require that any SPV customer switching to the Companies' DBS should be installed for free, including an antenna to receive local channels. OCC Brief, p. 12.

As noted by the Companies, the Department has no regulatory oversight over the Companies' announced DBS offering, and the Department makes no findings thereupon. However, the Department encourages the Telco to work with customers regarding these issues in an effort to mitigate customer unhappiness.

III. FINDINGS OF FACT

1. In 1996, the Telco entered the cable marketplace and committed, through SPV, to bring cable competition to the entire State of Connecticut using a Hybrid Fiber Coaxial network to deliver ubiquitous, full service telephony, data and CATV service.

2. By Decision dated September 25, 1996, in Docket No. 96-01-24, the Department awarded an 11-year statewide CATV franchise to SPV.

3. In 1998, SPV began to express concerns regarding its continued provision of CATV service because of HFC technology changes, but committed to maintain its franchise until at least October 2000.

4. SPV previously demonstrated that its HFC-based network for combined telephony and cable television satisfied, at that time, the commercial impracticability test specified in federal law.

5. SPV planned to rely on the Telco’s HFC-based network for delivery of CATV services; as HFC was deployed, SPV would lease network capacity and deploy its services.

6. No party to Docket No. 99-04-02 disputed that SPV's lease of the Telco's HFC-based network in concert with the Telco's provision of telephony services over the same network was a basic assumption underlying SPV's CATV franchise award.

7. Advances in copper loop technologies such as xDSL expanded service and bandwidth capabilities of copper networks so that with some enhancements, copper networks could efficiently and economically offer high-speed data services.

8. Unlike incumbent local exchange companies such as the Telco, cable operators are not required to upgrade their plant to provide telecommunications services ubiquitously nor are they required to offer all the services that incumbent telecommunications companies offer.

9. SPV's delivery of CATV services over HFC remains reliable, and customer feedback on the value and quality of the CATV product remains positive.

10. Incumbent local exchange companies continue to move away from HFC-based networks as a full service network solution.

11. At some time between the Department's August 25, 1999 Decision and January 1, 2000, the Companies changed without notice to the Department, its allocation of network costs 85% to SPV and 15% to the Telco, rather the 50/50 allocation that had been used historically.

12. SPV's 1999 financial statements were audited by independent outside auditors in accordance with generally accepted accounting principles.

13. SPV continues to be unprofitable, and has been so since its inception.

14. Evidence continues to support the Companies' assertion that HFC, as deployed by the Telco, has not to date proven financially viable, and is not expected to do so in the foreseeable future.

15. The full slate of telephone services that the Telco offers today remains unavailable on an HFC-based network.

16. No other telephone or cable company is utilizing an HFC-based infrastructure for the delivery of ubiquitous telephone and CATV products.

17. SPV's network architecture has essentially three tiers, with operational responsibility shared with the Telco through operating and shared service agreements.

18. Every area that SPV serves is also served by an incumbent cable operator.

19. Review of cable tariffs indicates an average figure for a prewired home installation and two outlets to be in excess of $50 when averaged among the pool of cable operators selected by the Companies.

20. The Application included details regarding SPV's credit proposal; SPV's customer notice did not.

21. Approximately 501 SPV customers have paid for non-standard installations.

22. SPV drops are compatible with incumbent cable operator's plant.

23. The Department has no regulatory oversight over DBS.

IV. CONCLUSIONS AND ORDERS

A. CONCLUSIONS

The Department has supported and endeavored to foster a competitive environment for Connecticut's consumers in the cable marketplace. The failure of HFC technology, as deployed by the Telco, to develop as a full service network and the financial drain it has caused on the Telco require the Department to accept SPV's proposal to relinquish its CPCN. The decision by the Southern New England Telecommunications Corporation and SPV to withdraw from the cable marketplace extinguishes for now the promise of vigorous cable competition in Connecticut. The Department will ensure that SPV's market withdrawal will have the least disruptive impact on subscribers.

It is somewhat paradoxical that SPV's competitive provision of cable services offered so much promise, and was so well received by subscribers and the communities served, but is now a victim of industry trends toward newer and more promising technologies. Terms of SPV's proposed market exit plan are generally acceptable, if amended as described herein, and if the Companies maintain a high level of customer service throughout the transition period.

In recognition of the Department's competitive service goals, the Department encourages the Companies to work cooperatively with CTTEL and any other party interested in utilizing the Telco's network, or portions thereof, in the provision of competitive services, including cable television.

B. ORDERS

For the following Orders, please submit an original and ten copies of the requested material, identified by Docket Number, Title, and Order Number, to the Department's Executive Secretary.

1. No later than May 1, 2001, the Companies shall report to the Department regarding plans to determine fair market value of the coaxial cable and the video-related equipment portion of the HFC network. The plan shall also include an organized disposition plan, subject to Department approval, prior to the sale, transfer or removal of any SPV assets or pieces of the HFC network used in the provision of cable-related services.

2. No later than May 1, 2001, the Companies shall report to the Department regarding plans for final disposition and accounting treatment, including related effect on the Telco's depreciation accounts, of any portion of the HFC network that is sold, retired, leased, and/or written-off the Telco's and SPV's books. The plans must also include any investments in the HFC network that are reused and that will continue to reside on the Telco's books.

3. No later than March 21, 2001, the Companies shall submit to the Department for review and approval a market exit plan amended as described herein, and

including a separate notice to customers served by non-standard installations. If the Companies so choose, the market exit plan may be set to begin no sooner than April 1, 2001.

4. No later than September 5, 2001, the Companies shall report to the Department regarding the number of $50 subscriber credits issued.

5. No later than September 5, 2001, the Companies shall report to the Department regarding the number of non-standard installation credits issued.

DOCKET NO. 00-08-14 APPLICATION OF SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORPORATION AND SNET PERSONAL VISION, INC. TO RELINQUISH SNET PERSONAL VISION, INC.'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Donald W. Downes

Linda Kelly Arnold

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

______________________________	March 14, 2001
Louise E. Rickard Acting Executive Secretary Department of Public Utility Control	Date